NO. 93-933

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM 1993

MARITIME OVERSEAS CORPORATION
AND ATLANTIA TANKER CORPORATION,
Petitioners,

VERSUS

HAE WOO YOUN,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the general maritime law allows double recovery to a seaman, specifically, whether a seaman can recover both future pain and suffering and past and future mental anguish in addition to damages for past and future loss of enjoyment of life, disability and disfigurement, as was allowed in the instant case?

2. Whether a Jones Act seaman can recover prejudgment interest, as was allowed in the instant case, when the award of such is contrary to recent pronouncements of this Court in both Jones Act and FELA cases?

3. Whether a seaman can be awarded past and future lost of found when, as in the instant case, there is absolutely no evidence of the actual cost of his food or clothing.

LIST OF PARTIES

The following are the parties to this proceeding:

1. Hae Woo Youn, respondent;

2. Maritime Overseas Corporation, petitioner;*

3. Atlantia Tanker Corporation, petitioner;**

4. Assuranceforeningen GARD, defendant.

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* Pursuant to Supreme Court Rule 29.1, petitioner, Maritime Overseas Corporation, states that it has no parent or non-wholly owned subsidiaries.

** Pursuant to Supreme Court Rule 29.1 petitioner, Atlantia Tanker Corporation, states it is part of a group of companies which comprises the Overseas Ship Holding Group, Inc., 114 Avenue of the Americas, New York, NY 10036.

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The decision of the Louisiana Court of Appeal for the Fifth Circuit is reported at 605 So.2d 187 (La. App. 5th Cir. 1992) and is reproduced in Appendix E, pp. 18a-69a. The decision of the Supreme Court of Louisiana is reported at 623 So.2d 1257 (La. 1993) and is reproduced in Appendix A, pp. la-13a. On October 7, 1993, the Louisiana Supreme Court denied the application for rehearing filed by Maritime Overseas Corporation and Atlantia Tanker Corporation (collectively "MOC"), which order is reproduced in Appendix B, pp. 14a.

MOC moved the Louisiana Supreme Court for an order staying the execution and enforcement of the judgment pending its petition for *cetiorari* to this Court, which the Louisiana Supreme Court denied on October 11, 1993, which order is reproduced in Appendix C, p. 15a. MOC subsequently filed an application for stay of the enforcement of the judgment with this Court, which the Honorable Antonin Scalia denied on October 14, 1993, which order is reproduced in Appendix D, pp. 16a-17a.

JURISDICTION

On September 3, 1993, the Supreme Court of Louisiana reversed the judgment of the Louisiana Court of Appeal, Fifth Circuit and reinstated the district court's award to Hae Woo Youn of past and future loss of found in the amount of $41,222.00; past and future physical pain and suffering in the amount of $500,000.00; past and future mental anguish and loss of enjoyment of life in the amount of $500,000.00; and disability and disfigurement in the amount of $400,000.00. On October 7, 1993, that

court denied rehearing. MOC now files its petition for a writ of *certiorari*, pursuant to 28 U.S.C. §2101(c) and Supreme Court Rule 13.4.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The following statute is involved in this petition:

46 U.S.C. §688(a) (The Jones Act):

> Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right to trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such a seaman may maintain an action for damages at law with the right to trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principle office is located.

STATEMENT OF THE CASE

On July 10, 1989, Youn filed suit against Atlantia Tanker Corporation and Maritime Overseas Corporation (collectively "MOC") in the 23rd Judicial District Court, Parish of St. James, State of Louisiana, seeking damages for injuries sustained on May 23, 1989, when a lifting line struck his left leg while he was employed as boatswain aboard the M/T ATLANTIA, a Liberian oil tanker owned by Atlantia Tanker Corporation. Youn alleged negligence under the Jones Act (46 U.S.C. §688) and unseaworthiness under the general maritime law. Youn received meals and clothing while aboard the ship, and he sued also to recover, in part, compensation for the meals and clothing, his "found," he would have received but for his accident. MOC answered the petition and requested a trial by jury.

Youn moved to strike MOC's jury demand and also filed an amended petition designating his suit as "an admiralty or general maritime claim" pursuant to Louisiana Code of Civil Procedure Article 1732(6). The district court struck MOC's jury demand, MOC filed for supervisory and remedial writs, which were denied, (Appendix I, pp. 75a-77a.) MOC filed for a writ of *certiorari* to the Louisiana Supreme Court which was denied on April 16, 1990. (Appendix J., p. 78a.) Youn later amended the suit to name as an additional defendant, Assuranceforeningen GARD, the insurer of MOC.

On September 28, 1990, the matter was tried to the court. There is absolutely no evidence in the record as to the value per day of the meals and clothing provided to Youn. Instead, plaintiff's counsel had his economist calculate loss of found assuming a *per diem* rate of $10.00. No evidence whatsoever supports a $10.00 per day

allowance for found. On December 17, 1990, the district court rendered judgment in favor of Youn and against all defendants, *in solido,* awarding damages as follows: future medical expenses $40,000.00; past loss of net earnings — $22,642.00; future loss of net earnings — $200,000.00; past loss of found — $3,748.00; future loss of found — $37,474.00; past physical pain and suffering — $200,000.00; future physical pain and suffering — $300,000.00; past mental anguish and loss of enjoyment of life — $200,000.00; future mental anguish and loss of enjoyment of life — $300,000.00; and disability and disfigurement — $400,000.00. (Reasons for Judgment, Appendix L, pp. 82a-92a.)

All defendants filed a timely motion for suspensive appeal which the court granted. Youn did not answer the appeal.

On July 27, 1992, the Louisiana Court of Appeal for the Fifth Circuit concluded the district court abused its discretion with regard to the amount of general damages awarded to plaintiff, which the court of appeal reduced to $600,000.00. The court of appeal also reversed the district court's award of past and future loss of found, concluding plaintiff failed to produce any evidence to support an award for that amount of found or how many days Youn was entitled to receive meals and clothing. *Youn v. Maritime Overseas Corp.,* 605 So.2d 187, 192 (La. App. 5th Cir.) (hereinafter "*Youn I*," App. E., p. 60a.) The appellate court also reversed the district court's award of pre-judgment interest on future damages. *Id.* at 204, App. E., p. 52a. The court of appeal affirmed the other findings of the district court.

Youn and MOC both petitioned the court of appeal

for rehearing which petitions were denied on October 19, 1992. (Appendix M, p. 93a.)

On December 21, 1992, the Louisiana Supreme Court denied MOC's application for a writ of *certiorari* and/or review concerning the denial of trial by jury, the finding of liability, the excessiveness of the general damage award, the award of future medical expenses, and the award of past loss earnings. 609 So.2d 240, Appendix F, p. 70a. On that same date, the Louisiana Supreme Court granted Youn's application for writ of *certiorari* and/or review concerning only the court of appeal's reduction of general damages and disallowance of found. 609 So.2d 239, App. F, pp. 71a-72a.

MOC petitioned this Court for *certiorari* contending the district court's denial of MOC's jury request discriminated against maritime defendants in Louisiana state courts in violation of the Equal Protection Clause and the Supremacy Clause of the United States Constitution. This Court denied MOC's petition on May 17, 1993. 113 S.Ct. 2342, Appendix G, p. 73a. On June 21, 1993, this Court denied MOC's Petition for Rehearing of Order Denying Writ of *Certiorari*. 113 S.Ct. 3022, Appendix H, p. 74a.

On September 3, 1993, the Louisiana Supreme Court partially reversed the court of appeal and reinstated the district court's award of general damages and past and future loss of found. (*Youn II,* 609 So.2d 1257 (La. 1993), App. A., pp. 1a - 13a.) MOC sought rehearing of the Louisiana Supreme Court's September 3 decision, and raised for the first time the purely legal issues regarding double recovery and prejudgment interest. The Louisiana Supreme Court denied the motion for rehearing on October 7, 1993. (App. B, p. 14a)

REASONS FOR GRANTING THE WRIT

I. *MILES v. APEX MARINE CORP.* PROVIDES THE APPLICABLE ANALYSIS TO RESOLVE THE ISSUES IN THIS PETITION

In *Miles v. Apex Marine Corp.*, 498 U.S. 19, 111 S.Ct. 317 (1990), this Court held recovery for loss of society was not available under the general maritime law to any beneficiary of a true seaman and denied recovery of future loss of earnings to the estate of a deceased seaman, even if a general maritime law survival action exists. The Court's decision made it abundantly clear that whether he proceeds under the Jones Act or the general maritime law, a seaman's (or his beneficiaries') recovery is limited to those damages provided by the statute enacted specifically to deal with seaman's rights — the Jones Act, 46 U.S.C. §688. The *Miles* decision provides the analytical framework within which the award of damages to Youn and the award of prejudgment interest must be considered.

The *Miles* Court reviewed the legislative history of the Jones Act to determine whether the estate of a seaman could recover non-pecuniary damages:

> Enacted in 1920, the Jones Act makes applicable to seamen the substantive recovery provisions of the older FELA [Federal Employers' Liability Act, 45 U.S.C. §51, *et. seq.*] See 46 U.S.C. §688. FELA recites only that employers shall be liable in "damages" for the injury or death of one protected under the Act. 45 U.S.C.

> §51. In *Michigan Central R. Co. v. Vreeland*, 227 U.S. 59 (1913), however, the Court explained that the language of the FELA wrongful death provision is essentially identical to that of Lord Campbell's Act, 9 & 10 Vict. ch. 93 (1846), the first wrongful death statute. Lord Campbell's Act also did not limit explicitly the "damages" to be recovered, but that Act and the many state statutes that followed it consistently had been interpreted as providing recovery only for pecuniary loss. *Vreeland*, supra, at 69-71. The Court so construed the FELA. *Id.*
>
> When Congress passed the Jones Act, the *Vreeland* gloss on FELA, and the hoary tradition behind it, were well established. Incorporating FELA unaltered into the Jones Act, Congress must have intended to incorporate the pecuniary limitation on damages as well. We assume that Congress is aware of existing law when it passes legislation. See *Cannon v. University of Chicago*, 441 U.S. 677, 696-697 (1979). There is no recovery for loss of society in a Jones Act wrongful death action.

Miles, 498 U.S. at 32, 111 S.Ct. at 325. Accordingly, as the *Miles* Court recognized, the judicial interpretation of the FELA prior to the enactment of the Jones Act governs the interpretation of the Jones Act. Additionally, interpretations of the FELA should be considered in interpreting similar issues arising under the Jones Act.

The *Miles* Court also was quite clear in its reliance upon statutory guidelines for judge-made maritime law. The Court stated:

> Admiralty is not created in a vacuum; legislation has always served as an important source of both

> common law and admiralty principles.
>
> * * *
>
> The legislature does not, of course, merely enact general policies. By the terms of a statute, it also indicates its conception of the sphere within which the policy is to have effect. Congress, in the exercise of its legislative powers, is free to say "this much and no more." An admiralty court is not free to go beyond those limits.

Id. at 24, 111 S.Ct. at 321 (citations omitted).

Questioning the license of courts to fill gaps left by statutes, the Court noted:

> But in an area covered by the statute, it would be no more appropriate to prescribe a different measure of damages than to prescribe a different statute of limitations, or a different class of beneficiaries.
>
> * * *
>
> Incorporating FELA unaltered into the Jones Act, Congress must have intended to incorporate the pecuniary limitation of damages as well.

Id. at 31-32, 111 S.Ct. at 325. The guidelines set forth by the Court in *Miles* limit the award of damages in any action involving a Jones Act seaman, whether the vehicle for recovery be the Jones Act or a general maritime law remedy for unseaworthiness. As Justice O'Connor stated:

> Because this case involves the death of a seaman, we must look to the Jones Act.
>
> * * *

> Congress has limited the survival right for seaman's injuries resulting from negligence. As with loss of society in wrongful death actions, this forecloses the more expansive remedies in a general maritime action founded on strict liability.
>
> * * *
>
> Because Torregano's estate cannot recover for his lost future income under the Jones Act, it cannot do so under the general maritime law.

Id. at 36, 111 S.Ct. at 328.

Thus, the damages available under the general maritime law are limited to those available under the Jones Act, which in turn incorporated the damage limitations of the FELA and the related jurisprudence existing prior to 1920. As set forth below, neither loss of enjoyment of life, as a separate category of damages from pain and suffering and mental anguish, nor prejudgment interest are recoverable under the FELA. Thus, these damages are not recoverable under the Jones Act, and therefore, pursuant to *Miles,* such are not recoverable by a Jones Act seaman under any theory of recovery.

II. THE COURT BELOW ERRED AS A MATTER OF LAW IN ALLOWING YOUN DOUBLE RECOVERY FOR PAIN AND SUFFERING AND MENTAL ANGUISH, AS WELL AS LOSS OF ENJOYMENT OF LIFE, DISABILITY AND DISFIGUREMENT.

The Louisiana Supreme Court reinstated Youn's award of damages for physical pain and suffering ($500,000.00), mental anguish and loss of enjoyment of life ($500,000.00), and disability and disfigurement ($400,000.00). (623 So.2d at 1261, App. A, p. 10a-11a.) It is

an error of law to award separate recovery for each of the foregoing items of damages, as such comprises an improper cumulation or double recovery of physical pain and suffering and mental anguish. Pain and suffering is a "term used to describe not only physical discomfort and distress, but also mental and emotional trauma which are recoverable as elements of damage in torts." BLACK'S LAW DICTIONARY 1109 (6th ed. 1990). Mental anguish includes "both the resultant mental sensation of pain and also the accompanying feelings of distress, fright and anxiety. As an element of damages, mental anguish implies a relatively high degree of mental pain and distress; it is more than mere disappointment, anger, worry, resentment or embarrassment, although it may include all of these, and it includes mental sensation of pain resulting from such painful emotions as grief, severe disappointment, indignation, wounded pride, shame, despair and/or public humiliation." BLACK'S LAW DICTIONARY 985-86 (6th ed. 1990).

Disability has been defined as "the absence of competent, physical, intellectual, or moral powers; impairment of earning capacity; loss of physical function that reduces efficiency; or inability to work." BLACK'S LAW DICTIONARY 461 (6th ed. 1990). Thus an award for disability encompasses two areas of an individual's life: the impairment or inability to engage in employment activities and the impairment or inability to engage in recreational activities.

An award for loss of enjoyment of life purports to compensate an injured person for his inability to lead "what would have been a normal life style in the absence of injury." 2 M. MINZER, ET AL., DAMAGES IN TORT ACTIONS §8.01, pp. 8-2 - 8-4 (1986). The basis for recovery of loss of enjoyment of life ranges from extreme disfigure-

ment to chronic headaches and can arise from any consequence which adversely affects the injured party's enjoyment of life. *Id.* at pp. 8-5 - 8-8. Inconvenience, humiliation, loss of ability to engage in pastimes, and loss of the right to be a normal human being are synonymous with loss of enjoyment of life. *Id.* at p. 8-8.

In *Dugas v. Kansas City So. Ry. Lines*, 473 F.2d 821 (5th Cir.), *cert. denied*, 414 U.S. 823, 94 S.Ct. 124 (1973), the Fifth Circuit reversed the award of damages to an injured rail yard worker on the grounds that the district court improperly had instructed the jury to consider the loss of enjoyment of life and the loss of vitality suffered by the plaintiff in awarding damages. The court observed that the FELA created federal substantive rights protected by federal law which governed the propriety of jury instructions. *Id.* at 826-27. The court concluded an award for loss of enjoyment of life would amount to a double recovery for pain and suffering.

> [T]he effect of injuries upon the normal pursuits and pleasures of life is an included item, not a separate one, that is, the normal pursuits and pleasures of life are to be included as a part of pain, suffering and inconvenience. *It is not a factor to be separately measured as an independent ground for damages.*

Id. at 827 (emphasis added). The court also concluded loss of vitality was an included element of pain, suffering and inconvenience.

In *Hanson v. Reiss S.S. Co.*, 184 F. Supp. 545 (D. Del. 1960), the district court concluded a Jones Act seaman was not entitled to a separate award for "loss of life's pleasures," which should be included in the award for pain

and suffering. Likewise, in *Harnesk v. Carnival Cruise Lines*, 1991 WL 329584 (S.D. Fla. 1991), the district court concluded that loss of enjoyment of life was an element of pain and suffering.

The Louisiana Supreme Court erred as a matter of law in permitting Youn, a Jones Act seaman, to recover for physical pain and suffering and mental anguish, as well as for loss of enjoyment of life, disability and disfigurement. Loss of enjoyment of life is not a separate compensable loss independent of pain and suffering. The lower courts' awards for past and future loss of enjoyment of life should be reversed and those awards disallowed as duplicative of the awards for past and future pain and suffering.

The Louisiana Supreme Court also improperly allowed damages for disability and disfigurement, which cumulated other damage awards. Youn's damages for disability were compensated by: (a) the awards for past and future loss of earnings, which represent his inability to engage in employment activities; and (b) the awards for pain and suffering which include mental anguish and the loss of enjoyment of life, which flow from his disability/inability to engage in recreational activities.

Lastly, damages for disfigurement conceivably compensated Youn for his public humiliation, embarrassment, and shame concerning the appearance of his left leg. Yet, disfigurement has already been compensated through the awards of pain and suffering.

MOC submits the Court should grant *certiorari* to eliminate the double recovery of Youn for disability and for pain and suffering, mental anguish and loss of earning

capacity, and for disfigurement and for pain and suffering. Clearly an award for pain and suffering includes loss of enjoyment of life. Loss of enjoyment of life is not a separate element of damages under either the FELA or the Jones Act. Additionally, disfigurement is a component of mental anguish and pain and suffering, for which Youn already has been compensated. Lastly, Youn's disability is reflected in the awards for loss of earnings, mental anguish and pain and suffering. MOC respectfully requests the Court to disallow the awards for loss of enjoyment of life, disability, and disfigurement, as those damages amount to a double recovery.

III. THE RECOVERY OF PREJUDGMENT INTEREST BY A JONES ACT SEAMAN IS PRECLUDED BY THIS COURT'S DECISION IN *MILES V. APEX MARINE CORP.*

The Jones Act, 46 U.S.C. §688, has been interpreted as providing a seaman with an election between two negligence actions — an action in admiralty or an action at law. MOC disputes that this interpretation is correct, as will be discussed below. However, even were this interpretation correct, a Jones Act seaman is not entitled to recover prejudgment interest, whether the action is brought "in admiralty" or "at law."

Initially, it seems clear that prejudgment interest is not recoverable in an action under the Jones Act brought at law. *Theriot v. J. Ray McDermott & Co., Inc.*, 742 F.2d 877, 883 (5th Cir. 1984); *Domangue v. Penrod Drilling Co.*, 748 F.2d 999, 1000 (5th Cir. 1984); *Sanford Bros. Boats, Inc. v. Vidrine*,. 412 F.2d 958, 972 (5th Cir. 1969). This

holding is based on the incorporation into the Jones Act of the limitations on damages recoverable under the Federal Employers Liability Act (FELA), 45 U.S.C. §51. This Court has held that prejudgment interest is not available under the FELA. *Monessen S.W. Ry. Co. v. Morgan,* 486 U.S. 330, 108 S.Ct. 1837 (1988).

Despite consistent rulings that prejudgment interest is not recoverable in an action under the Jones Act brought at law, some courts have held that prejudgment interest is recoverable in a Jones Act action brought in admiralty. The Fifth Circuit has held that when a Jones Act action is brought in admiralty and is tried to a judge, not a jury, the recovery of prejudgment interest is within the sound discretion of the trial judge. *Williams v. Reading & Bates Drilling Co.,* 750 F.2d 487, 491 (5th Cir. 1985); *Domangue,* 748 F.2d at 1000.

MOC submits it is improper to make a recovery available to a Jones Act seaman in an action brought in admiralty which exceeds that available to a Jones Act seaman in a similar action brought at law under the Jones Act. A negligence action brought in admiralty under the Jones Act, if such action exists, is at best a judicially-created action. The Jones Act, by its express terms, gives seamen a right of action at law. "Any seamen who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury ..." 46 U.S.C. §688(a). The statute itself does not mention in any way an action at admiralty.

However, in 1924, this Court held the Jones Act permits a seaman to assert his action on the admiralty side of

the court. *Panama R.R. Co. v. Johnson*, 264 U.S. 375, 44 S.Ct. 391 (1924). This holding has been recognized by some of the leading admiralty commentators as pure judicial invention. G. Gilmore & C. Black, Jr., THE LAW OF ADMIRALTY, §6-22, p.340 (2d ed. 1975). In fact, the authors seem surprised that the holding has not been questioned. *Id.* Prior to the passage of the Jones Act in 1920, a seaman *had no action for the negligence* of the master or the crew. He did, however, have an action against the vessel and her owner for unseaworthiness under the general maritime law. *The OSCEOLA*, 189 U.S. 158, 175, 23 S.Ct. 483, 487 (1903).

Thus, no *negligence* action existed which could be brought on the admiralty side of the court. The *Panama* Court construed the language of the Jones Act as allowing a seaman to bring a negligence action on the admiralty side of the court, notwithstanding the fact that no such action preexisted the Jones Act (as recognized by *The OSCEOLA*, *supra*, but apparently not realized by the *Panama* Court) and that no such action is provided for in the statute itself. The *Panama* Court misinterpreted the Jones Act as allowing a negligence action to be brought at law or in admiralty. The Jones Act merely creates a negligence action at law, not in admiralty. The Jones Act action brought in admiralty, though of longstanding recognition, is a judicially-created cause of action, concocted by this Court in 1924 in order to enable the Jones Act to pass a possible constitutional challenge should the Jones Act be viewed as divesting the federal courts of jurisdiction over certain admiralty causes of action. By creating a Jones Act cause of action in admiralty, the *Panama* Court avoided this challenge.

However, the *Miles* Court has held that the damages available in a judicially-created action under the general maritime law cannot exceed the damages available under the Jones Act. Where Congress has acted in creating a remedy, the courts are not free to expand those remedies. "[L]egislation sends other signals to which an admiralty court must attend ... Congress, in the exercise of its legislative powers, is free to say 'this much and no more.' An admiralty court is not free to go beyond those limits." *Miles*, 498 U.S. at 24, 111 S.Ct. at 321. The Court recognized that Congressional statutes "both direct and delimit our actions." *Id.* at 27, 111 S.Ct. at 323. Further, the Court recognized that it must defer to Congress. "We sail in occupied waters. Maritime tort law is now dominated by federal statute, and we are not free to expand remedies at will simply because it might work to the benefit of seamen and those dependent upon them" *Id.* at 36, 111 S.Ct. at 327. Finally, the Court acknowledged "It would be inconsistent with our place in the constitutional scheme were we to sanction more expansive remedies in a judicially-created cause of action in which liability is without fault then Congress has allowed in cases of death resulting from negligence." *Id.* at 32-33, 111 S.Ct. at 326.

The Fifth Circuit has held that the *Miles* deference to legislation and mandate for uniformity bars the claim under the general maritime law for loss of consortium brought by a spouse of an injured seaman. *Michel v. Total Transp., Inc.*, 957 F.2d 186 (5th Cir. 1992); *Murray v. Anthony J. Bertucci Constr. Co., Inc.*, 958 F.2d 127 (5th Cir. 1992), *cert. denied*, ____ U.S. ____, 113 S.Ct. 190 (1992). In *Murray*, the Fifth Circuit noted the *Miles* Court's strong deference to Congress and federal maritime legislation.

"We are required, therefore, to look to the Jones Act to consider the scope of the damage award for a seaman's injury." *Murray*, 958 F.2d at 131.

The United States Court of Appeals for the Sixth Circuit has held that the *Miles* decision bars recovery of punitive damages by an injured seaman. *Miller v. American President Lines, Ltd.*, 989 F.2d 1450 (6th Cir.), *cert. denied*, __U.S.__, 114 S.Ct. 304 (1993). In so holding, the *Miller* court recognized that courts must look to federal legislation when determining the damages available to a seaman.

Several U.S. District Courts have considered the issue of whether the *Miles* decision bars a claim for prejudgment interest brought by a Jones Act seaman. These courts have held that *Miles* does not preclude prejudgment interest, primarily on one of two grounds: (1) the "snapshot in time" argument espoused in *Anglada v. Tidewater, Inc.*, 52 F.Supp. 722 (E.D. La. 1990) or the "substantive" argument set forth in *Melancon v. Petrostar Corp.*, 762 F.Supp. 1261 (W.D. La. 1991).

The "snapshot in time" argument posits that since awards of prejudgment interest were available on general maritime law claims prior to the enactment of the Jones Act in 1920, the passage of the Jones Act, with its limitations on recoverable damages, thus does not affect the recovery of prejudgment interest. *Anglada*, 752 F.Supp. at 725-26. This argument fails. The existence of the right to recover prejudgment interest prior to the passage of the Jones Act supports MOC's arguments. Congress is presumed to be aware of existing law when it passes legislation. *Miles*, 498 U.S. at 32, 111 S.Ct. at 325. Prior to 1920,

prejudgment interest was not recoverable under the FELA, which was enacted in 1908. See *Bennett v. Atchison, T&SF.R. Co.*, 187 Iowa 897, 903-04, 174 N.W. 805, 807 (1919); *Grow v. Oregon Short Line R. Co.*, 47 Utah 26, 29, 150 P. 970, 971 (1915). As recognized by this Court, "the federal and state courts have held with virtual unanimity over more than seven decades that prejudgment interest is not available under the FELA." *Monessen*, 486 U.S. at 338, 106 S.Ct. at 1844 (citations omitted). Congress incorporated the FELA into the Jones Act. The failure of the Jones Act expressly to allow prejudgment interest requires the application of the FELA bar to recovery of prejudgment interest, and not the application of the general maritime law rule regarding prejudgment interest. If Congress wanted seamen to recover that item of damages, it easily could have included language to that effect in the Jones Act.

In *Melancon*, the district court distinguished an award for loss of consortium, a cause of action unavailable under the Jones Act and therefore clearly barred under the general maritime law by *Miles*, from an award of prejudgment interest, which it concluded was not a "substantive cause of action." *Melancon*, 762 F.Supp. at 1263. This argument is contrary to this Court's jurisprudence. In *Monessen*, this Court held that prejudgment interest is substantive in nature. *Monessen*, 468 U.S. at 336, 108 S.Ct. at 1843 (1988) Clearly, since the Jones Act incorporates the FELA, prejudgment interest under the Jones Act must also be substantive. Considering this, the *Melancon* holding erroneously strays from the *Miles* analysis.

Under the reasoning of *Miles*, if an item of damages

is not recoverable under the Jones Act, the seaman (or his beneficiaries) cannot recover it under the general maritime law. When viewed in these straight-forward terms, it becomes obvious that, logically, damages which are not recoverable under the Jones Act in an action at law should not be recoverable under the Jones Act in an action in admiralty (if such action exists). Inasmuch as the FELA prohibits an award for prejudgment interest, *Monessen,* the Jones Act which incorporates the FELA, prohibits an award of prejudgment interest. Thus, prejudgment interest likewise is not recoverable by a seaman under the general maritime law.

IV. NO EVIDENCE IN THE RECORD SUPPORTS AN AWARD FOR PAST AND FUTURE LOSS OF FOUND.

The district court awarded Youn past and future loss of found at a rate of $10.00 per day based on the trial court's inference - without any evidence to support such inference - that the award represented the daily cost of food and clothing MOC provided to Youn while aboard the ATLANTIA. The Louisiana Fifth Circuit set aside the district court's award for loss of found, properly concluding plaintiff failed to offer any evidence as to the value, per day, of meals and clothing, or as to the number of days Youn received, and in the future would receive, meals and clothing aboard the ATLANTIA. *Youn I,* 605 So.2d at 208, App. E,p. 60a. The appellate court also correctly determined it was improper for the district court to take judicial notice of the rate and amount of loss of found, as those facts were disputed at trial. *Id.* at 207, App. E, p. 60a.

The Louisiana Supreme Court reinstated the district court's award but did not address the impropriety of the district court taking judicial notice of the rate and amount of found. Instead, the Louisiana Supreme Court, relying on *Jordan v. Travelers Ins. Co.*, 257 La. 995, 245 So.2d 151 (1971) and *Stiles v. K-Mart Corp.*, 597 So.2d 1012 (La. 1992) for the proposition that a court can infer *from the evidence* the amount of the loss of found, concluded:

> Here, the trial judge set the award for loss of found at $10 per day on the basis of evidence that plaintiff's employer had provided meals, lodging and clothing to him daily and the trial court's inference that these daily items would cost at least that amount. Moreover, awards for loss of found in other reported decisions have far exceeded that daily amount. We conclude that the award of $10 per day was supported and should have been upheld.

Youn II, 623 So.2d at 1262, App. A, p. 13a.

MOC requests this Court to review the decision of the Louisiana Supreme Court in light of the general maritime law requirement that the evidence support the amount of an award. While loss of found compensates a seaman for his loss of food and lodging, and thus may sometimes be confused with maintenance, which compensates a seaman for food and lodging until the seaman attains maximum medical cure, recovery for loss of found requires proof of the value of those services. Mere guesses cannot suffice to support an award. *Tallentire v. Offshore Logistics, Inc.*, 754 F.2d 1274, 1288 (5th Cir. 1985)(reversing the award for economic loss because the

base salary supporting the award was a "guess"), *rev'd on other grounds,* 474 U.S. 816, 106 S.Ct. 60 (1986).

One commentator observed:

> The tendency to confuse or merge maintenance and found clearly has crept into the jurisprudence. Hence, there is a necessity for clarification to demonstrate the distinctions between the two concepts....Maintenance is generally thought of in somewhat established and "fixed" figures. For example, $8.00 or $15.00 per day. But there would be no similar "pre-set" figure for the value of found.

D. Normann, HAS FOUND BEEN LOST? AN ANALYSIS OF A SELDOM UTILIZED CONCEPT IN THE MARITIME LAW, 30 Loy. L. Rev. 875, 880 (1985). Maintenance is generally determined by one of three methods: the provisions of a union contract, custom within a given port, or the actual value of food and lodging aboard the vessel. *Robinson v. Plimsoll Marine, Inc.,* 460 F.Supp 949, 950 (E.D. La. 1978).

One reported decision comprises the whole of the jurisprudence counsel for MOC could locate concerning the actual calculation for loss of found. In *Alexandervich v. Gallagher Bros. Sand & Gravel Corp.,* 298 F.2d 918 (2d Cir. 1961), the Second Circuit reversed the trial court's award for loss of found of $8.00 per day (the daily maintenance rate under the union contract) from the date of maximum medical cure through the date of judgment because that amount was not proved by plaintiff. The trial court had awarded plaintiff two-thirds of the daily rate to reflect

Alexandervich's work schedule: two weeks aboard the vessel, one week at home. *Id.* at 921, n. 3. The court of appeals rejected the award of found based on the maintenance rate and concluded an award for found can be made only when actual food and lodging expenses are incurred. *Id.* at 921. Because Alexandervich maintained a home on shore for his family while he was employed aboard the vessel, he was not entitled to found based on the cost of his lodging at home. *Id.* at 922. The Second Circuit reasoned such an award was not an incentive for plaintiff to work aboard the vessel, but was merely for the employer's convenience. Plaintiff also failed to prove the actual cost of his food on shore. However, the court concluded plaintiff could recover $2.07 per day for his meals (part of found), based upon the union contract — which was in evidence.

In this instance, plaintiff presented no evidence concerning the actual cost of food and clothing aboard the ATLANTIA, or his costs when he was at home. The district court accepted the calculations made by Youn's economist. Those calculations, however, were not based on any evidence, but rather were based on assumptions posited by *Youn's counsel.* (R. Vol. 9, pp. 2381-83, App. K, pp. 79a-80a.) The record is devoid of a factual basis to support that assumption. This is borne out by the cross-examination of the economist, during which he admitted he had no information whatsoever concerning the value of found. (R. Vol. 9, pp. 2399-2400, App. K, p. 81a.) Furthermore, there is no evidence from which the court could infer the appropriate amount of found. Thus, there is no evidence to support counsel's assumptions of the value of found at $10.00 per day, and the award of found, past and future, must be disallowed.

In *Stiles,* the Louisiana Supreme Court reversed the court of appeal's disallowance of damages for future medical expenses because plaintiff failed to produce any evidence to support the amount of that award. That Court concluded plaintiff could establish future medical expenses through *evidence* of past medical expenses. *Stiles,* 597 So.2d at 1013.

In *Jordan,* the Louisiana Supreme Court reversed the court of appeal, which had disallowed any recovery for economic losses because plaintiff failed to produce his tax returns or other documentary evidence of his earnings. Plaintiff, his wife and his employer *testified* concerning his approximate earnings. That court concluded that *testimony* concerning one's economic losses, if credible, was substantial *evidence* to support the award for economic losses. *Jordan,* 245 So.2d at 154-55.

In contrast, plaintiff here presented absolutely no evidence to support the award of found based on $10.00 a day for food and clothing. His counsel merely suggested that a $10.00 per day rate be assumed by his economist; this suggestion was not supported by any evidence whatsoever. The Louisiana Supreme Court's decisions in *Stiles, supra,* and *Jordan, supra,* clearly are distinguishable — and in fact support the rejection of any award for found in this case.

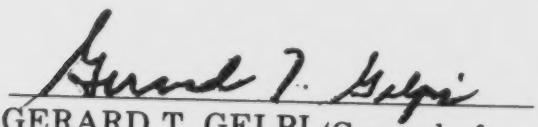
MOC respectfully submits that the Louisiana Supreme Court's decision to reinstate the award of found based upon non-existent evidence goes far beyond the leeway presented by the rationale of *Stiles* and *Jordan* and contravenes the general maritime law. In effect, the Louis-

iana Supreme Court, in this case, has elevated the suggestion and argument of counsel to evidence. Just as plaintiff must establish by a preponderance of the evidence the Jones Act negligence and the unseaworthiness of the vessel to establish defendants' liability, plaintiff likewise bears the burden of proof in establishing by competent evidence his damages caused by the alleged negligence and unseaworthiness. In the absence of *any* evidence concerning the value of meals and clothing provided to Youn by MOC while he was aboard the vessel, and if and for how long in the future he would have received these benefits, this Court should grant *certiorari* to correct the decision of the Louisiana Supreme Court and affirm the judgment of the Louisiana Fifth Circuit denying recovery for loss of found.

CONCLUSION

For the foregoing reasons, Atlantia Tanker Corporation and Maritime Overseas Corporation respectfully submit this Honorable Court grant a writ of *certiorari* to the Louisiana Supreme Court limited to the issues of the double recovery of pain and suffering, the award of prejudgment interest and the reinstatement of the award for loss of found.

Respectfully submitted,



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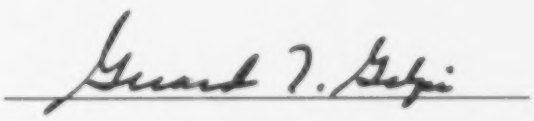
CERTIFICATE OF SERVICE

I do hereby certify that on this 10th of December, 1993, a copy of the foregoing pleading has been served upon all counsel for all parties to this proceeding, by mailing same United States mail, properly addressed, and first class postage prepaid.



NO. 93-933

Supreme Court, U.S.
FILED
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In the Supreme Court of the United States

OCTOBER TERM 1993

MARITIME OVERSEAS CORPORATION
AND ATLANTIA TANKER CORPORATION,
Petitioners,

VERSUS

HAE WOO YOUN,
Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF LOUISIANA

APPENDIX

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APPENDIX A

SUPREME COURT OF LOUISIANA

No. 92-C-3017

HAE WOO YOUN

Versus

MARITIME OVERSEAS CORP. ET AL

ON WRIT OF CERTIORARI TO THE COURT OF APPEAL, FIFTH CIRCUIT, PARISH OF ST. JAMES

FILED
SEP 3 1993

LEMMON, Justice*

The sole issue before the court in this personal injury case is whether the court of appeal erred in reducing the trial court's award of general damages and in deleting the award of loss of found.

Plaintiff, a boatswain on a Liberian oil tanker, was injured aboard ship in May of 1989 when a steam valve on the port winch opened too quickly, causing the drum to spin and the cable to whip around the deck out of control. When plaintiff attempted to prevent the boom from falling

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* Pursuant to Rule IV, Part 2, §3, Watson, J. was not on the panel which heard and decided this case. *See* footnote in *State v. Barras*, 615 So.2d 285 (La. 1993).

on his shipmates, the cable wrapped around plaintiff's left thigh and crushed his leg.

Plaintiff filed this action against the vessel owner, the supplier of the crew that operated the vessel, and their insurer. After a bench trial, the judge found the defendants negligent in failing to repair the control level known to be broken and to train the crew properly. Further finding plaintiff was not contributorily negligent, the judge awarded plaintiff damages in the amount of $1,703,864, itemized as follows:

Medical expenses, future	$	40,000
Past loss of net earnings		22,642
Future loss of net earnings		200,000
Past loss of found		3,748
Future loss of found		37,474
Past physical pain and suffering		200,000
Future physical pain and suffering		300,000
Past mental anguish and loss of enjoyment of life		200,000
Future mental anguish and loss of enjoyment of life		300,000
Disability and disfigurement		400,000
TOTAL	$	1,703.864

On defendants' appeal, the intermediate court affirmed the judgment in most respects, but reduced the damages award by almost one-half. 605 So.2d 187. The court reviewed plaintiff's injuries and resulting disability and disfigurement, concluding:

> Even though Youn's injuries are undoubtedly severe, and permanent in some respects, we find that in certain areas, the trial court abused its discretion (on the high side) in awarding damages of 1.4 million dollars. Accordingly, we turn to comparable cases to determine the highest amount the trial court could have reasonably awarded in this case.

605 So.2d at 202. The court then reviewed comparable cases and cut the awards of $500,000 for past and future physical pain and suffering to $214,200, the awards of $500,000 for past and future mental anguish and loss of enjoyment of life to $214,200, and the award of $400,000 for disability and disfigurement to $171,600.[1] The court further deleted the $44,222 award for past and future loss of found because of failure of proof.

On plaintiff's application, this court granted certiorari to review the appellate court's reduction of the awards. 609 So.2d 239.

In plaintiff's accident in May of 1989, his left thigh received the full force of the falling boom. After brief unconsciousness, he endured great pain while waiting an hour

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[1] The court thus reduced the total award of general damages from $1,400,000 to $600,000.

for the helicopter to transport him to the hospital. Dr. David Davis, the vascular surgeon who became the treating physician, found plaintiff's foot cool and lacking a pulse and his thigh twice the normal size. Plaintiff had no sensation below his knee and was justifiably fearful when told he might lose his leg.

During the emergency surgery, Dr. Davis found that plaintiff's femoral artery, the primary blood supply to his leg, had been completely severed. The artery had to be reconstructed by surgery requiring an incision from plaintiff's groin almost to his ankle. The incision required skin grafting sixteen inches long and six inches wide.

Recovery was painful because of rejuvenating of the nerves and return of sensation. Development of an infection which required debridement further complicated the recovery.

Dr. Martin Bell, the reconstructive surgeon who described the muscle injury "as if muscle tissue had been squeezed out like toothpaste," found progressive necrosis of the muscle tissue and eventually had to remove two-thirds of the quadriceps muscle of the thigh. Dr. Bell also performed four additional surgeries under general anesthesia in May and June. The first surgery involved exploration, irrigation and debriding of the wound and secondary closure of the wound with cadaver skin. The second, which involved an abscess of the thigh, included removal of the staples from the skin grafts and exploration, incision and drainage of the hematoma. The third removed the cadaver skin and regrafted with plaintff's own skin taken from his back. The fourth was for ischemic necrosis of the

quadriceps muscle, consisting of removal of staples and retentive sutures, regrating of the knee, and exploration and evacuation of the hematoma and necrotic muscles of the thigh.

During the five weeks of hospitalization and surgical procedures, morphine and demerol were administered to help plaintiff endure the pain. Plaintiff's distress was worsened by the fact that he was alone in a foreign country with demoralizing injuries to his leg.

Plaintiff returned to Korea after his release from the hospital, but his hamstring muscle ruptured, requiring a sixth surgery. The hamstring muscle is still not functioning normally.

At trial, Dr. Davis described plaintiff's leg as consisting of bone, artery and skin, with all the muscle gone. The lack of muscle protecting the artery which supplies blood to the leg subjects plaintiff to significant risk of further serious and life threatening injury. The reconstructive surgeon testified that plaintiff's massive tissue defect, with skin graft basically overlying the bone, has the potential to break down. The surgeon recommended additional surgery to graft muscle mass onto the thigh.

Plaintiff's disability is permanent and likely to worsen. He walks with a limp and cannot walk any great distance. He cannot perform manual labor or heavy lifting, cannot be on his feet for extended periods of time, cannot climb stairs, and cannot do repetitive bending, stooping, squatting or kneeling. Plaintiff's doctors have assigned a permanent disability rating of thirty to thirty-eight per-

cent. He has significant limitation of motion of the leg and of the knee, as well as scarring of the donor sites on the back and the opposite leg. Dr. Davis opined that his condition renders remote his chance for gainful employment in Korea.

At the time of trial, plaintiff still had pain, swelling, numbness, and lack of feeling in the leg. His physical condition is likely to worsen because vascular grafts have a limited life span and are more prone to development of blockage and arteriosclerosis than normal arteries.

Plaintiff suffers anxiety and mental pain over his grotesque disfigurement. His wife was "disgusted" when she saw his disfigured leg, and emotional problems have developed over this concern. Plaintiff is also understandably disturbed emotionally about his ability to fulfill his family responsibilities and the probability of future worsening of his physical condition.

The trial judge thoughtfully weighed these facts in fixing the amount of the awards. In reasons for judgment, the judge stated:

> These awards are more than deserved. The plaintff's left leg is nothing more than a stick connecting his thigh bone to his ankle. The scarring demonstrated in the pictures represents a river of gruesome tattoos which encompass and circle the entire leg, from groin to foot. Plaintiff's leg is embroidered with an ugly snake-like appearance. The Court has never seen such a dismaying scene. The Court was most impressed with plaintff's sincerity and obvious heartache over his condi-

tion. Plaintiff's leg is useless for anything other than support. Dr. Davis described the skin over the bone as a paper thin leg. Plaintiff is in constant jeopardy of any intrusion into the leg, cutting the vessel, and placing his life at risk. There are no muscles, meat, nor fatty tissue in plaintiff's left thigh. Plaintiff's leg swells constantly, will never improve, and is expected to continue on a consistently downward course. Plaintiff will need future medical expenses because the vessels grafted in his leg will wear out over time. This will require at least two more surgeries based on plaintiff's life span. The Court does not see how plaintiff can accomplish any type of future work other than desk duty for which he appears both situationally and educationally unsuited. The plaintiff is totally and permanently disabled, can never return to any kind of physical activity, and must drag around with him, a constant reminder of this event. The impression from plaintff's testimony, and viewing photographs of his existing condition, persuades the Court that plaintiff is a depressed, sorrowful, embarrassed, gentleman who had previously led an active, healthy, and vital existence. Plaintiff is described as a model patient who was most grateful to his American doctors for saving his life. Modern medicine can only do so much, however, and plaintiff's discussion of his wife's reaction when observing his leg upon his return home and to this date, persuades the court that the disfigurement award is required. Plaintiff leads a life of embarrassment, pain and shame as a result of the injury. He will have lifetime problems. The independent medical exam ordered by the defendants

reflects 90 to 100% strength loss in the left leg, and is described by their doctor, as a "near traumatic amputation of the left lower extremity." Plaintiff has a significant whole body impairment rating.

For over an hour plaintiff lay on the deck of the ship where he had worked with pride and dignity, fearful that he would never again stand on his own two feet. The obvious pain described by Capt. Choi was immense both while waiting for the helicopter, and at the hospital. Plaintiff was placed under the most powerful sedatives for most of his hospital stay. As recovery occurred, pain increased with the regeneration of the nerves. Today plaintiff has limited motion no vitality, and no capacity to exercise or use the leg because of its delicate nature. He lives in constant apprehension of further injury. He has legitimate concerns over blood clots, loss of circulation and graft failures. He lives in Korea, and wet and cold weather create additional problems in his thigh area which the doctors describe as expectable and severe.

In *Reck v. Stevens*, 373 So.2d 498 (La. 1977), this Court commented on appellate review of general damage awards and on the "much discretion" in fixing damages accorded to trial courts by La. Civ. Code art. 1934(3)(1870).[2] The decision pointed out that the role of an appellate court in reviewing general damages is not to decide what it considers to be an appropriate award, but rather to review the exercise of discretion by the trier of fact. Each case is

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[2] The same discretion is mandated today by La. Civ. Code art. 1999.

different, and the adequacy or inadequacy of the award should be determined by the facts or circumstances particular to the case under consideration.

In *Reck,* this court disapproved the appellate court's simply reviewing the medical evidence and then concluding that the award for those injuries was excessive, without taking into consideration the particular effect of the particular injuries on the particular plaintiff. This court further disapproved of the use of a scale of prior awards in cases with generically similar medical injuries to determine whether the particular trier of fact abused its discretion in the awards to the particular plaintff under the facts and circumstances peculiar to the particular case. The initial inquiry is whether the award for the particular injuries and their effects under the particular circumstances on the particular injured person is a clear abuse of the "much discretion" of the trier of fact. *Gaspard v. LeMaire,* 245 La. 239, 158 So.2d 149 (1963); *Ballard v. Natinal Indem. Co. of Omaha, Neb.,* 246 La. 963, 169 So.2d 64 (1964); *Lomenick v. Schoeffler,* 250 La. 959, 200 So.2d 127 (1967). Only after such a determination of an abuse of discretion is a resort to prior awards appropriate and then for the purpose of determining the highest or lowest point which is reasonably within that discretion. *Coco v. Winston Industries, Inc.,* 341 So.2d 332 (La. 1976); *Bitoun v. Landry,* 302 So.2d 278 (La. 1974); *Spillers v. Montgomery Ward & Co.,* 294 So.2d 803 (La. 1974).

The standard for appellate review of general damage awards is difficult to express and is necessarily nonspecific, and the requirement of an articulated basis for disturbing such awards gives little guidance as to what

articulation suffices to justify modification of a generous or stingy award. Nevertheless, the theme that emerges from *Gaspard v. LeMaire,* 245 La. 239, 158 So.2d 149 (1963) through *Coco v. Winston Industries, Inc.,* 341 So.2d 332 (La. 1976), and through *Reck* to the present case is that the discretion vested in the trier of fact is "great," and even vast, so that an appellate court should rarely disturb an award of general damages. Reasonable persons frequently disagree about the measure of general damages in a particular case. It is only when the award is, in either direction, beyond that which a reasonable trier of fact could assess for the effects of the particular injury to the particular plaintiff under the particular circumstances that the appellate court should increase or reduce the award.

In the present case the court of appeal apparently believed that the general damage award for a leg loss or injury could not exceed $600,000. In reaching this conclusion, the court considered the medical injuries, but apparently did not consider the terrified condition of plaintiff while on the deck waiting for a helicopter after a near traumatic amputation when he had attempted to protect his shipmates; the physical pain and mental agony of the surgeries and treatment while alone in the hospital in a foreign country; the "grotesque" appearance of the leg (as characterized by the reconstructive surgeon) consisting only of bone, artery and skin; the justified fear of worsening of the already fragile condition and of further injury or death from otherwise innocuous physical contact; the obvious concern over the inability to fulfill family responsibilities because of the disability that certainly will require continuing medical care and probably will worsen; the devastating effect of the disability and disfigurement on

plaintiff's marital relationship and personal esteem; and the mental anguish and anxiety naturally accompanying the above considerations and the continuing swelling, numbness, pain and suffering.

When these and other factors are properly considered under the standards discussed above, we cannot say that the trial judge abused his discretion in fixing the generous awards of general damages. The awards are not obviously the result of passion or prejudice, and they bear a reasonable relationship to the elements of the proved damages. Many rational triers of fact could have decided that a lower award is more appropriate, but we cannot conclude from the entirety of the evidence in this record, viewed in the light most favorable to the prevailing party in the trial court, that a rational trier of fact could not have fixed the awards of general damages at the level set by the trial judge or that this is one of those "exceptional cases where such awards are so gross as to be contrary to right reason." *Bartholomew v. CNG Producing Co.*, 832 F.2d 326 (5th Cir. 1987). We accordingly reinstate that portion of the judgement of the trial court relating to general damages.

As to the trial judge's award for loss of found, the appellate court held that plaintiff had not established the value of the loss and set aside the award.

"Found" is an admiralty term which describes the element of damages representing the value of the living expenses provided to a seaman by his employer as a condition of employment while aboard ship. Found generally includes expenses for food, lodging and clothing. Frank L. Maraist, *Admiralty in a Nutshell* 194 (2d ed. 1988).

Plaintiff clearly suffered this loss, inasmuch as he will never again receive these sums from his employer while aboard ship. The only issue is the precise value of the loss.

In *Jordan v. Travelers Ins. Co.*, 257 La. 995, 245 So.2d 151 (1971), the plaintiff had failed to introduce income tax returns and other earnings records, but had testified regarding his employment history. The lower courts denied his claim for loss of earnings because of failure of proof. This court held that plaintiff had proved that he, more probably than not, had sustained some loss of pretrial and future earnings, and proceeded to fix an award based on the less-than-perfect evidence.

In *Stiles v. K-Mart Corp.*, 597 So.2d 1012 (La. 1992), plaintiff proved that he would require future medical treatment, but did not present expert testimony as to the cost of the treatment. The court of appeal deleted the trial court's award for this item of damages, but this court reinstated the award, noting:

> When the record establishes that future medical expenses will be necessary and inevitable, the court should not reject an award of future medical expenses on the basis that the record does not provide the exact value of the necessary expenses, if the court can examine the record and determine from evidence of past medical expenses and other evidence a minimum amount that reasonable minds could not disagree will be required. La. Code of Civ. Proc. art. 2164.

597 So.2d at 1013.

Here, the trial judge set the award for loss of found at $10 per day on the basis of evidence that plaintff's employer had provided meals, lodging and clothing to him daily and the trial court's inference that these daily items would cost at least that amount. Moreover, awards for loss of found in other reported decisions have far exceeded that daily amount. We conclude that the award of $10 per day was supported and should have been upheld.

Accordingly, the judgment of the court of appeal is set aside in part, and the awards by the trial court for general damages and loss of found are reinstated.

APENDIX B

SUPREME COURT OF LOUISIANA

No. 92-C-3017

HAE WOO YOUN

Versus

MARITIME OVERSEAS CORP. ET AL

ON WRIT OF CERTIORARI TO THE COURT OF APPEAL, FIFTH CIRCUIT, PARISH OF ST. JAMES

APPLICATION FOR REHEARING **DENIED.**

WATSON, J. - not on the panel.

October 7, 1993.

APPENDIX C

SUPREME COURT OF LOUISIANA

No. 92-C-3017

HAE WOO YOUN

Versus

MARITIME OVERSEAS CORP. ET AL

ON WRIT OF CERTIORARI TO THE COURT OF APPEAL, FIFTH CIRCUIT, PARISH OF ST. JAMES

The motion to stay execution and enforcement of judgment is **denied.**

October 11, 1993.

APPENDIX D

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543

WILLIAM K. SUTER
CLERK OF THE COURT

AREA CODE
202-479-3011

October 14, 1993

Re: Maritime Overseas Corporation, et al.,
v. Hae Woo Youn
Application No. A-323

Dear Mr. Gelpi:

The application for a stay of enforcement of judgment of Supreme Court of Louisiana pending timely filing and disposition of a petition for a writ of certiorari in the above-entitled case has been presented to Justice Scalia, who on October 14, 1993 endorsed thereon the following:

"Denied
14/X/93
AS"

Very truly yours,

WILLIAM K. SUTER, Clerk

BY /s/ Francis J. Lorson

Francis J. Lorson
Chief Deputy Clerk

NOTE: - FOR YOUR INFORMATION: A copy of this letter has been sent to all interested parties shown on the attached notification list.

APPENDIX E

HAE WOO YOUN

v.

MARITIME OVERSEAS CORP., Atlantia Tanker Corp., and Assuranceforengen Gard.

No. 91-CA-407

Court of Appeal of Louisiana
Fifth Circuit.

July 27, 1992.

Rehearing Denied, Oct. 19, 1992.

Paul Due, Due, Smith & Caballero, Baton Rouge, Gordon Crawford, Gonzales, Lewis Unglesby, Unglesby & Barrios, Baton Rouge, for plaintiff, appellee.

F. Scott Kaiser, Thomas Kiggins, Phelps, Dunbar, Marks, Claverie & Sims, Baton Rouge, M.D. Yaeger, Terriberry, Carroll, Yancey & Farrell, New Orleans, James B. Kemp, New Orleans, for defendants, appellants.

Before BOWES, GRISBAUM and WICKER, JJ.

BOWES, Judge.

Plaintiff, Hae Woo Youn, filed suit for damages, naming as defendants Maritime Overseas Corporation (MOC) and Atlantia Tanker Corporation (Atlantia) under the Jones Act, 46 U.S.C.App. Section 688 and also the general maritime law pursuant to the "savings to suitors" clause of 28 U.S.C. Section 1333. Youn subsequently amended his petition to also name, as a defendant, Assuranceforeningen [sic] GARD (GARD), the marine liability insurer for MOC and Atlantia. After trial on the merits,

judgment was rendered in favor of plaintiff and against all defendants, in solido, for $1,703,864.00, plus interest and costs. After the denial of defendants' motions for new trial, this appeal was perfected. We amend and as amended, affirm in part and remand in part the judgment of the trial court.

FACTS

Plaintiff, Hae Woo Youn, was the boatswain ("bosun") on the M/T Atlantia, a Liberia oil tanker owned by Atlantia. The M/T Atlantia was operated by and the crew furnished by MOC. On May 23, 1989, Youn, and two other crew members, working under Youn's instructions, were using the ship's port winch preparing to hoist the ship's gangway back on board in preparation for the ship's departure. The winch controls consist of a lever and a steam valve. A crew member, O/S Hae, locked the control lever into place (direction) and then opened the steam valve to start the rotation of the gypsy head drum, which pulls in the slack of the wire cable used to hoist heavy objects. The steam valve opened too quickly, causing the drum to spin too fast and out of control, which resulted in the cable coming off the gypsy head and whipping around uncontrollably on the deck floor. Plaintiff called to Quartermaster Choi to engage the stopper to keep the crane boom from falling, however, Choi became frightened and abandoned his post. Youn ran to the stopper and en route there, was hit by the cable, causing serious and permanent injury and deformity to his left leg.

ISSUES: MOC AND ATLANTIA

On appeal, MOC and Atlantia allege the following assignments of error:

1.

If the district court had subject matter jurisdiction, it erred in denying defendants the right to a jury trial.

2.

The trial court erred in assuming jurisdiction because Youn designated his suit as an "admiralty or general maritime claim pursuant to La.Code Civ.P. art. 1732(6) thereby invoking the exclusive jurisdiction of the federal admiralty courts.

3.

The trial court erred in finding that the M/T ATLANTIA was unseaworthy and that such condition caused Youn's injuries.

4.

The trial court erred in finding that defendants were negligent and that such negligence caused Youn's injuries.

5.

The trial court erred in finding no comparative negligence on the part of Youn, who chose to use an unsafe procedure because it was "faster" and "easier."

6.

The trial court erred in denying defendants' Motion to Supplement the Record and Motion for New Trial whereas Youn was permitted to offer post-trial evidence to prove both liability and damages, and the evidence offered by defendants was intended to prevent the perpetration of a fraud on the court.

7.

The trial court erred in assessing liability against MOC because it was not the owner or operator of the M/T ATLANTIA, and was not Youn's employer.

8.

The trial court's award of general damages in the amount of $1,400,000.00 is excessive. The award should be substantially reduced or set aside and a new trial ordered.

9.

The trial court erred in awarding prejudgment interest as to the entire damage award since a substantial portion of the award represents future losses for which interest would not have accrued.

10.

The evidence does not support the trial court's award for future medical expenses in the amount of $40,000.00.

11.

The evidence does not support the trial court's award for past loss of earnings in the amount of $22,642.00.

12.

The evidence does not support the trial court's award of past and future loss of "found" in the amount of $41,222.00.

ISSUES: GARD

GARD alleges as error the following:

1.

The trial court erred in not dismissing the petition, as amended, for want of subject matter jurisdiction, plaintiff having designated his claims as purely admiralty or maritime claims of which federal district courts have exclusive jurisdiction.

2.

The trial court erred in denying the defendants their substantive federal right to trial by jury of Jones Act and general maritime law claims.

3.

The trial court erred in not maintaining GARD's exception of no cause of action or no right of action against it under the Louisiana Direct Action Statute, La.R.S. 22:655, or otherwise.

4.

With plaintiff not having met his burden of proving any insurance coverage and the terms and provisions of any such coverage, the trial court erred in rendering judgment against GARD.

5.

The trial court erred in denying GARD's motion for continuance of the trial.

We shall consider GARD's assignments of error later in logical sequence, but first we shall consider the assignments of error by both Atlantia and MOC in convenient groups as follows:

TRIAL BY JURY/SUBJECT MATTER JURISDICTION

Defendants, Atlantia and MOC, as well as defendant GARD, first argue that the trial court action in striking MOC and Atlantia's request for a jury was error. They also agree and urge that a plaintiff's designation of his suit as admiralty or maritime under C.C.P. art. 1732(6) impermissibly usurps jurisdiction of admiralty cases from the federal courts. Finally, it is alleged that C.C.P. art.

1732(6) is unconstitutional in that it operates to deprive a defendant his right to trial by jury.

In response to plaintiff's original petition, Atlantia in its answer, requested trial by jury. Plaintiff then filed a first supplemental and amending petition, in which he clarified his position that he was filing suit both under the Jones Act and under General Maritime Law and further stated that "Plaintiff specifically designates this suit as an admiralty or general maritime claim for purposes of eliminating any right to trial by jury in accordance with 1732(6) of the Louisiana Code of Civil Procedure."

Plaintiff next filed a second amended petition which again stated that his claim was a general maritime claim and therefore defendants had no right to a jury trial under LSA-C.C.P. art. 1732(6).

MOC then filed its answer, and also requested a jury trial therein.

Plaintiff filed a motion to strike defendant's jury demands which was granted by the trial court. MOC and Atlantia applied for supervisory writs to this Court. Writs were refused.

Defendant's application for a review of our decision was quickly filed with the Louisiana Supreme Court who also refused writs. *Hae Woo Youn v. Maritime Overseas Corporation*, 559 So.2d 1367 (La. 1990). Thus, our decision was, in effect, affirmed by the Supreme Court.

Immediately before trial, GARD filed a removal notice alleging that plaintiff's election to proceed under general maritime law operated to divest the trial court of jurisdiction. Federal District Judge Sear of the Eastern

District of Louisiana found no merit to defendant's argument as it remanded the case back to state court before the state court trial began.

Youn asserts that the decisions of this court and the Louisiana Supreme Court, denying defendant's supervisory relief should be considered "law of the case," precluding further consideration of these issues.

The Louisiana Supreme Court explained the principle of "law of the case" in *Day v. Campbell-Grosjean Roofing & Sh. Metal Corp.*, 260 La. 325, 256 So.2d 105, 107 (1971):

> With regard to an appellate court, the 'law of the case' refers to a policy by which the court will not, on a subsequent appeal, reconsider prior rulings in the same case. This policy applies only against those who were parties to the case when the former appellate decision was rendered and who thus had their day in court. Among reasons assigned for application of the policy are: the avoidance of indefinite relitigation of the same issue; the desirability of consistency of the result in the same litigation; and the efficiency, and the essential fairness to both parties, of affording a single opportunity for the argument and decision of matter at issue. [Footnotes omitted].

The "law of the case" principle applies to all decisions of an appellate court, not merely those arising from the full appeal process. *Mihalopoulos v. Westwind Africa Line, Ltd.*, 511 So.2d 771 (La.App. 5 Cir.1987); *City of New Orleans v. Rasmussen*, 542 So.2d 13 (La.App. 4 Cir.1989), *writ denied*, 548 So.2d 334 (La.1989).

Ordinarily, we would decline to reconsider this issue pursuant to the principle of "law of the case." However, in this instance, we note that GARD was not a party to the suit at the time the issue was raised by writs to this Court and the Louisiana Supreme Court. The principle of "law of the case" is to be applied only against those who were parties to the cases when the former appellate decision was rendered and who thus had their day in court. *Gaudet v. G.D.C., Inc.*, 477 So.2d 731 (La.App. 1 Cir.1985); *Day v. Campbell-Grosjean Roofing & Sh. Metal Corp.*, supra.

Accordingly, we *will consider* these issues again in this appeal.

LSA-C.C.P. art. 1732(6) provides that a trial by jury shall *not* be available in:

> A suit on an admiralty or general maritime claim under federal law that is brought in state court under a federal 'saving to suitors' clause, if the plaintiff has designated that suit as an admiralty or general maritime claim.

Defendants' first allegation, that the trial court erred in striking their request for jury trial, was found meritless in *Heinhuis v. Venture Associates, Inc.*, 558 So.2d 1244 (La.App. 1 Cir.1990), *writ denied*, 559 So.2d 1369 and 1385 (La.1990), wherein the court held that, pursuant to C.C.P. art. 1732(6), the option of whether or not to have a jury trial rests *solely* with the *plaintiff*. Furthermore, plaintiff's cumulation of his Jones Act claim with an admiralty or general maritime claim does *not* open the door for the defendant Jones Act employer to demand a jury trial.

At the time of oral argument in November, 1991, *Heinhuis* was the only positive ruling on this issue,

although there was a case from the Fourth Circuit, *Gauchet v. Chevron USA Inc.*, 541 So.2d 272 (La.App. 4 Cir.1989), which expressed a contrary sentiment in dicta – and at that time, we chose to follow the *Heinhuis* ruling as the more correct interpretation. Since that time, however, on May 26, 1992, the Louisiana Supreme Court has settled the matter with finality by holding, *on rehearing*, that Jones Act claims are admiralty and maritime claims and that, pursuant to LSA-C.C.P. art. 1732(6), the plaintiff alone had the right to elect whether his case would be decided by a jury or by the trial court. *Parker v. Rowan Companies, Inc.*, 599 So.2d 296 (La.1992).

In *Sons v. Inland Marine Service, Inc.*, 577 So.2d 225 (La.App. 1 Cir.1991), the First Circuit rejected defendants second argument, that the legislature, in its enactment of C.C.P. art. 1732(6), supra, prohibiting jury trials in admiralty or general maritime cases, attempted to usurp jurisdiction of admiralty cases from the federal courts, contrary to the United States Constitution. In rejecting this argument, the First Circuit stated that:

> . . . the article does not impermissibly usurp jurisdiction of admiralty cases because state courts already have concurrent jurisdiction over *in personam* admiralty actions. Nothing in the article seeks to establish jurisdiction over *in rem* admiralty suits, which are *exclusively* within the jurisdiction of federal courts. Therefore, defendants' first argument has not merit. At p. 229. [Emphasis partially ours].

Defendants' position was also rejected by the Eastern District of Louisiana in *Bergeron v. Quality Shipyards*, 765 F.Supp. 321, 323 (E.D.La.1991), wherein the court said:

> Second, we are at a loss, from either a logical or legal perspective, as to how the invocation of a state procedural rule which limits the availability of a jury trial in a state court proceeding, confers upon this court exclusive federal admiralty jurisdiction. It is well established that state courts have concurrent jurisdiction to try in personam admiralty actions. [Citations omitted].

Defendants next argue that the trial court's action in striking their demand for trial by jury violated their constitutional rights under the Supremacy Clause and the Equal Protection Clause of the United States Constitution.

In *Sons*, supra, this same argument was rejected:

> Defendants contend the trial court's denial of their request for a trial by jury denies them due process, equal protection of the laws, and equal access to the courts in violation of the United States and Louisiana Constitutions. However, the United States Supreme Court has held that the Seventh Amendment right to jury trials in civil cases is not so fundamental to the American system of justice as to be required of state courts by the due process clause of the Fourteenth Amendment. See *Melancon v. McKeithen*, 345 F.Supp. 1025, 1035 (E.D.La.1972), *affirmed*, 409 U.S. 943, 1098, 93 S.Ct. 289, 908, 34 L.Ed.2d 214, 67? (1973); *Rudolph v. Massachusetts Bay Insurance Co.*, 472 So.2d 901 (La.1985). The denial of a jury trial in a state civil proceeding also does not violate the equal protection clause of the United States Constitution. *Letendre v. Fugate*, 701 F.2d 1093 (4th Cir.1983).
>
> In addition, there is no due process right to a jury trial in civil cases under the Louisiana Constitution of 1974. See *Fidelity & Guaranty*

Insurance Company v. Succession of Smith, 525 So.2d 348, 353 n. 3 (La.App. 1st Cir.1988). At page 229.

The court then noted that the state had legitimate interests in enacting LSA-C.C.P. art 1732(6), first to make the procedure in state admiralty cases consistent with the procedure in the federal court system, where a plaintiff may also designate his claim as an admiralty or general maritime claim to preclude defendant from having a jury trial, (see F.R.C.P. 9(h) and *Romero v. Bethlehem Steel Corporation*, 515 F.2d 1249 (5th Cir.1975), and second to minimize the delays and greater court costs which generally attend jury trials. *Sons*, supra and *Heinhuis*, supra.

Finally, the court noted that the denial of a jury trial does not operate to deny defendants access to the courts as "they still will have an adequate opportunity to defend themselves before an impartial trier of fact." At page 230.

Accordingly, these assignments of error are rejected.

LIABILITY FOR PLAINTIFF'S INJURIES

Atlantia and MOC allege that the trial court erred in finding them 100% liable to plaintiff under the theories of unseaworthy and negligence.

Initially, we note that the Louisiana Supreme Court has set down instructions very emphatically, and on several occasions, relative to the findings of fact made by the trial court, as enunciated in *Rosell v. Esco*, 549 So.2d 840 (La.1989) (and other cases) and more recently, and more positively, in *Martin v. East Jefferson General Hospital, et al.*,

582 So.2d 1272 (La.1991), and we acknowledge that appellate courts are bound to abide by same. In *Martin*, the Supreme Court stated:

> . . . 'if the trial court or jury's findings *are reasonable* in light of the *record* reviewed in its *entirety*, the court of appeal may not reverse, even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently.' *Sistler v. Liberty Mutual Ins. Co.*, 558 So.2d 1106, 1112 (La.1990); *Arceneaux v. Domingue*, 365 So.2d 1330 (La.1978). We have instructed the appellate courts that when there are two permissible views of the evidence, the factfinder's choice between them *cannot* be manifestly erroneous or clearly wrong. [Emphasis added].

Additionally, in *Sutton v. Central Gulf Lines, Inc.*, 433 So.2d 888, 891 (La.App. 5 Cir.1983), this Court examined the scope of review applicable in an admiralty case (Jones Act):

> Initially, we acknowledge that while we enjoy full constitutional authority to review both the law and facts in civil cases; nevertheless, under federal law and jurisprudence, the findings of the trial judge on the merits may not be disturbed unless they are clearly erroneous. Jones Act, 46 U.S.C.A. Section 688; Federal Rule of Civil Procedure, Rule 52(a); *Cooper v. Keyes Offshore, Inc.*, 421 So.2d 385 (La.App. 1 Cir.1982); *Portier v. Texaco, Inc.*, 426 So.2d 623 (La.App. 1 Cir. 1982). The courts in *Cooper, supra,* and *Portier, supra,* both looked to the United States Supreme Court for an explanation of the 'clearly erroneous' rule and in *McAllister v. United States,*

348 U.S. 19, 75 S.Ct. 6, 99 L.Ed. 20 (1954), found the following:

> A finding is clearly erroneous when 'although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.' 348 U.S. at 20, 75 S.Ct. at 7.

The trial court made findings of fact as follows:

The accident happened because the boat was in an unseaworthy condition, and because of negligence. The winch control lever had been broken for some period of time and did not operate. Accepting the testimony in the light most favorable to the defendants, the Court finds that the winch lever was dysfunctional. Furthermore, the lever could easily and should easily have been repaired during the six months that it was broken while the boat was in American waters. The crew was non-trained. The Court is impressed by the testimony of all crew members that there were no safety manuals written in Korean, that there was no training provided for any crew members, and that the procedure of MOC as to hire the Korean crew member and put him on the boat. On-the-job training can be expected to lead to accidents. Defendants were negligent. They allowed the crew to use the steam valve because the winch lever did not work. The Court finds that the use of the steam valve is not a safe method, and is not the method intended in the design of the ship for the use of the winch. Mr. Heu released too much steam, accelerating the speed of the winch, leading to the accident. The negligence of a crew member in employing a method

approved by his employer is actionable. Choi was ordered to engage the crane reel stopper in the event that the winch control lever began to operate out of control. Choi, because he was afraid, and was being peppered by debris coming off the cable, ran from his post. This placed Bosum Youn in the predicament of having no stopper. At the time that Choi abandons his post, the winch is out of control, Heu has over-accelerated the steam, and the crane boom is beginning to fall. Youn attempts to take action to preserve his employer's property and to save the lives of his fellow workers. The winch cable snaps Youn's leg, creating his injury.

The Court resolves this as a simple matter. The Court finds that there is gross negligence in regard to the failure of MOC and Atlantia to provide a seaworthy vessel, and to repair a known broken piece of equipment. The burden of the plaintiff is light. A vessel owner/ employer is deemed negligent if it fails to exercise reasonable care to maintain a reasonably safe work environment. In this case, the evidence overwhelmingly preponderates in favor of plaintiff and against defendant.

The Court finds as a fact, that the crew was not properly trained in the operation of the winch. The Court finds as a fact, that there was no training to the crew as to what action to take in the event the winch became out of control as occurred here, and further, that because the vessel owner failed to repair the broken winch, or to employ an automatic stopper, it was foreseeable that an event such as this would occur. The Court finds that at no time, did any superior

member of the Atlantia crew, or MOC Corporation, require Youn or anyone else to use any alternative method in winding the winch.

Defendants argue that the use of the gypsy head to wind the excess cable onto the winch drum, would avoid the accident. The defendants suggest that all slack between the crane reel and winch drum should be taken in. The Court was impressed by the fact that the actions taken by Youn appeared to be commonplace, and further that the captain of the boat had no knowledge as to what methodology was correct. The captain admits that they were in a substantial hurry because the pilot had come to move the boat and that it was Youn's job to get the crane in a position to shove off. Youn testified and his crew members support the idea, that the method he was using was the most efficient, and that they had never been instructed to avoid that method nor of any safety hazards created by the method.

The Court is not impressed by the defendants' efforts to blame the accident on Youn's use of the method employed by him, instead of their failure to train their crew, and to repair their broken equipment which they provided to Youn.

The Court is not impressed by the claim that Youn used a 'shortcut' in view of the Captain's testimony that they were in a hurry to take off, and all witnesses' testimony that Youn was an experienced, knowledgeable bosun. The Court finds that had the winch been repaired, or had the untrained crew members stayed at their post, or had the steam valve not been overcharged, the accident would have been avoided.

All this is directly placed at the feet of the defendants. Furthermore, from reviewing the evidence, including the photographs, the Court does not believe that it would be practical or probable, that all of the line could be placed on the gypsy head.

* * *

The Court does not find Mr. Youn contributorily negligent. He acted in accordance with his training, he was given inadequately trained helpers, one of whom abandoned his post, and he was required to work with defective equipment. The Court is well aware of the pressure placed upon a foreign seaman to do the job required, and the inability of a seaman to refuse his duties. The Court further notes the substantial conflicts in the testimony of the crew between their discovery depositions taken by the plaintiff and their trial depositions several days later. The Court recognizes in those depositions that the crew members were kept under the total control of the defendants, that certain relevant crew members were present in New Orleans in order to provide information to defense counsel, and at least one was then sent to Tokyo rather than provided for testimony. The record reflects that Port Captain Williams made an inspection of the vessel right after the accident, and condemned the actions of the crew and recognized the failure of the equipment. This information was not provided to plaintiff until the eve of trial, and then only inadvertently. The Court, in evaluating the evidence, believes the statements of the crew members taken in the discovery depositions, believes the statements of Captain Williams in his June

> inspection report, accepts the testimony of Captain George Blann as more reasonable based on facts and evaluations consistent with accepted maritime safety practices, and finds evidence in favor of Youn on the issues of unseaworthiness, negligence, and lack of comparative negligence overwhelming.

A careful review of the entire record and particularly the conclusions stated above have convinced us these findings of fact are reasonable and are abundantly sufficient to find liability in tort and under general maritime law on the part of Atlantaia [sic] and MOC. Accordingly, we find no manifest error in the findings of fact and conclusions reached by the trial court.

CLAIMS UNDER (1) THE JONES ACT AND (2) UNSEAWORTHINESS

The claims of negligence under the Jones Act and because of unseaworthiness are separate and distinct claims. *Usner v. Luckenbach Overseas Corp.*, 400 U.S. 494, 91 S.Ct. 514, 27 L.Ed.2d 562 (1971).

Under general maritime law, a shipowner has an absolute duty to provide the members of his crew with a seaworthy vessel. A ship is unseaworthy unless it and all of its appurtenances and crew are reasonably fit and safe for their intended purpose. *Miles v. Melrose*, 882 F.2d 976 (5th Cir.1989), *affirmed, Miles v. Apex Marine Corp.*, ___ U.S. ___, 111 S.Ct. 317, 112 L.Ed.2d 275 (1990). The duty of a shipowner to provide a seaworthy vessel is absolute; actual or constructive knowledge by the owner of the unseaworthy condition is not necessary to support liability. In addition, a showing of due diligence or lack of

negligence by the owner will not negate liability. *Mitchell v. Trawler Racer, Inc.*, 362 U.S. 539, 80 S.Ct. 926, 4 L.Ed.2d 941 (1960). To prevail on an unseaworthiness claim, a plaintiff must show that the vessel was unseaworthy and that the unseaworthy condition was the proximate cause of his injury. *Alverez v. J. Ray McDermott & Co.*, 674 F.2d 1037 (5th Cir.1982).

Under the Jones Act, a vessel owner is deemed negligent if he fails to exercise reasonable care to maintain a reasonably safe work environment. *Ceja v. Mike Hooks, Inc.*, 690 F.2d 1191 (5th Cir.1982).

The trial court found that the winch control lever was broken, and therefore the crew had to use the steam valve to control the winch. The seaman using the steam valve released too much steam, accelerating the speed of the winch and causing the accident. The trial court also found that the crew was non-trained, and that this was a fault or negligence assignable to the defendants and that this also contributed to the accident.

We see no manifest error in the trial court's judgment finding that the vessel was unseaworthy and that Atlantia and MOC were negligent in failing to provide to plaintiff a safe place to work.

Atlantia and MOC agree upon and urge that plaintiff was comparatively negligent in using the "line unattached" instead of the "line attached method."

In *Ceja*, supra at 1194, the court said:

> Generally, a seaman has *no duty* to find the safest way to perform his work. *Comeaux v. T.L. James & Co.*, supra, 666 F.2d [294] at 300 [5th

> Cir.1982]; *Spinks v. Chevron Oil Co.*, 507 F.2d 216, 223 (5th Cir.1975), *clarified*, 546 F.2d 675 (5th Cir.1977) ('His duty is to do the work assigned, not to find the safest method of work'). Rather, the duty to provide for a safe course of conduct lies primarily with the vessel owner. A seaman, therefore, is not contributorily negligent merely because he uses an unsafe tool or appliance or proceeds in an unsafe area of the ship. Only where it is shown that there existed a safe alternative available to him of which he knew or should have known, can a seaman's choice of an unsafe course of action be properly considered in determining whether he was negligent. *Accord Joyce v. Atlantic Richfield Co.*, 651 F.2d 676, 682-83 (10th Cir. 1981). [Emphasis partially ours]. [Footnotes omitted].

The trial court found that the "line unattached" method utilized by Youn was sanctioned by the defendants, that this method was commonplace and was the most efficient method to raise the gangplank. The court further found that, from the evidence, use of the "line attached" method was not practical or probable with regard to plaintiff's tasks at the time of the accident.

We see no error in the trial court's decision finding that plaintiff was not comparatively negligent.

Finally, defendants argue that the trial court erred in disregarding OSHA regulations in its determination of plaintiff's standard of care. We see nothing in the record which shows that plaintiff was aware of the OSHA regulation which indicates that the "line attached method" is safer nor do we find anything to show that defendant's training, if any, of plaintiff included teaching plaintiff

OSHA regulations. Furthermore, in light of the court's finding that using the "line attached method" was neither probable nor practical in this case, the trial court's consideration of the OSHA safety regulation would not change the outcome of this case.

TRIAL COURT'S DENIAL OF INTRODUCTION OF POST-TRIAL EVIDENCE AND/OR MOTION FOR NEW TRIAL.

After the conclusion of the trial, MOC and Atlantia sought to have introduced into evidence a videotape demonstrating how to raise and lower the boom using the portside winch on the M/T Atlantia. Defendants also filed a motion for new trial alleging that this tape constituted newly discovered evidence.

We find that the trial court did not err in denying the introduction of the videotape into evidence one month after the conclusion of trial.

The videotape is experimental evidence attempting to refute plaintiff's expert's testimony that there was too much line on the portside winch which made using the "line attached" procedure unsafe and/or impossible. Before such evidence can be considered at trial a proper foundation for its admissibility must be established. There is ample jurisprudence holding that to establish a proper foundation the offering party must affirmatively show that the experiment was conducted under similar, if not precise, conditions as were present during the original act. *Hunnicutt v. Kent*, 434 So.2d 91 (La.App. 5 Cir. 1982), *writ denied*, 435 So.2d 442 (La.1983); *Guidry v. Boston Old Colony Ins. Co.*, 540 So.2d 543 (La.App. 3 Cir.), *writ*

denied, 543 So.2d 7 (La.1989). No such showing was made in this case.

MOC and Atlantia alternatively allege that the videotape was "newly discovered" evidence and therefore the trial court erred in not granting their motion for new trial.

LSA-C.C.P. art. 1972 provides:

> A new trial shall be granted, upon contradictory motion of any party, in the following cases:
>
> (1) When the verdict or judgment appears clearly contrary to the law and the evidence.
>
> (2) When the party has discovered, since the trial, evidence important to the cause, which he could not, with due diligence, have obtained before or during the trial.
>
> (3) When the jury was bribed or has behaved improperly so that impartial justice has not been done.

To obtain a new trial on the basis of newly discovered evidence there must be a clear showing not only that the evidence was discovered after trial, but that every reasonable and diligent effort was made to procure it before trial. *LeBlanc v. Consolidated Aluminum Co.*, 401 So.2d 1082 (La. App. 3 Cir.), *writ denied*, 409 So.2d 617 (La.1981).

Defendants argue that they did not become aware of plaintiff's expert's opinion until September 12, 1990, sixteen days before trial and that at that time they began efforts to board the M/V Atlantia. The ship did not enter the United States until September 24, 1990; and then it

had to be moved several times. The videotape was made on September 28, 1990 (the same day the trial began) and defendants received it October 1, 1990 one week after trial. However, defendants did not seek to have the tape introduced into evidence until November 2, 1990 – a delay of over four weeks.

From the record before us, we find that defendants have not borne their burden of showing that the videotape was "newly discovered" evidence and therefore are not entitled to a new trial. Defendants had full knowledge that the tape was being made on the day of trial. However, they withheld this important information from the court and opposing counsel and they made no attempt to have the trial judge hold the case open until the tape could be viewed and offered into evidence.

Furthermore, although defendants received the tape on October 1st, they waited over a month to seek its introduction into evidence. Under all these circumstances, we see no abuse of discretion whatsoever in the trial court's ruling denying defendant's motion for new trial.

Although this Court allowed defendants to supplement their brief with a copy of the videotape out of an abundance of caution to insure fairness, we decline to examine the videotape since it was not introduced into evidence at trial. Uniform Rules of Court – Courts of Appeal – Rule 1-3. *Coleman E. Adler & Sons, Inc. v. Waggoner,* 538 So.2d 1131 (La.App. 5 Cir.1989).

LIABILITY OF MOC

Under both general maritime law and the Jones Act, the employer of the seamen and the vessel owner may be

liable for negligent injury or death, or injury or death resulting from the unseaworthiness of the vessel. *Symeonides v. Cosmar Compania Naviera, S.A.*, 433 So.2d 281 (La.App. 1 Cir.), *writ denied*, 440 So.2d 731 (La.1983), *cert. denied, Cosmar Compania Naviera, S.A. v. Symeon Symeonides*, 465 U.S. 1079, 104 S.Ct. 1442, 79 L.Ed.2d 762 (1984).

MOC alleges that it does not own or operate the M/T Atlantia and was not the employer of plaintiff, and therefore, the trial court erred in holding MOC liable under general maritime law or under the Jones Act.

We are aware that only an employer can be liable under the Jones Act. *Karvelis v. Constellation Lines S.A.*, 806 F.2d 49 (2nd Cir.1986), *cert. denied, Constellation Lines S.A. v. Karvelis*, 481 U.S. 1015, 107 S.Ct. 1891, 95 L.Ed.2d 498 (1987). However, for the purposes of recovery, it may be possible for a seaman to have more than one Jones Act employer. *Guidry v. South Louisiana Contractors, Inc.*, 614 F.2d 447 (5th Cir.1980). In determining who is an employer for recovery under the Jones Act, "control" is the critical inquiry:

> Factors indicating control over an employee include payment, direction, and supervision of the employee. Also relevant is the source of the power to hire and fire. The control which is exercised must be substantial; the mere possibility of some control over the actions of an employee will not suffice to find an employer-employee relationship.

Volyrakis v. M/V Isabelle, 668 F.2d 863, 866 (5th Cir.1982).

We find here that MOC was an employer under the Jones Act for the following reasons.

The record in this case establishes that all of the crew members of M/V Atlantia who testified, including plaintiff, stated that MOC was their employer. Port Captain Williams also testified that the crew of the M/V Atlantia were working "indirectly" for MOC. Donald Farmer of MOC testified that MOC was responsible for "crewing" the vessel and for attending to all crew matters. The contract between MOC and Atlantia gave MOC "sole and exclusive management . . . of the said vessel," including the power to hire and fire crew, prepare payroll and otherwise conduct all business of the vessel – nothing could be more clear. Furthermore, the reports of plaintiff's injury were sent to MOC. In view of the above facts, we see no manifest error in the trial court's finding that MOC was plaintiff's employer.

Although both plaintiff and defendants argue the ownership status of MOC, the trial court made no finding regarding MOC's status as owner pro hac vice of the M/V Atlantia. Because we find plaintiff can recover damages from MOC, under the Jones Act, the issue of whether MOC is also owner, *pro hac vice*,[1] of an

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[1] An owner pro hac vice is:

> . . . one who assumes by charter or otherwise 'exclusive possession, control, command, and navigation' of a vessel for a specific period of time. An owner *pro hac vice* 'has complete – though perhaps only temporary – dominion over the vessel entrusted to him. He commands her navigation and is entitled to avail himself fully of her services.' 'It is therefore tantamount to, though just short of, an outright transfer of ownership.' [Citations omitted].

Bernier v. Johns-Manville Sales Corp., 547 F.Supp. 389, 394 (1982).

unseaworthy vessel is academic and need not be addressed. *McFarland v. Justiss Oil Co. Inc.*, 526 So.2d 1206 (La.App. 3 Cir.1988).

DAMAGES

The trial court awarded damages to Hae Woo Youn as follows:

1.	Medical Expenses, future	$ 40,000.00
2.	Past loss of net earnings	$ 22,642.00
3.	Future loss of net earnings	$ 200,000.00
4.	Past loss of found	$ 3,748.00
5.	Future loss of found	$ 37,474.00
6.	Past physical pain and suffering	$ 200,000.00
7.	Future physical pain and suffering	$ 300,000.00
8.	Past mental anguish and loss of enjoyment of life	$ 200,000.00
9.	Future mental anguish and loss of enjoyment of life	$ 300,000.00
10.	Disability and disfigurement	$ 400,000.00
	TOTAL	$1,703,864.00

MOC and Atlantia presents several allegations of the excessiveness of these awards.

First, defendants allege that the trial court erred in awarding $1.4 million in *general* damages.

In *Sutton v. Central Gulf Lines, Inc.*, supra, this Court set down the guidelines to review damage awards in a Jones Act case:

> In reviewing damages awarded to injured seamen under the Jones Act, such awards will

> not be disturbed unless they are so large as to shock the judicial conscience or indicate bias, passion, prejudice, corruption or any other improper notice. *Allen v. Seacoast Products, Inc.*, 623 F.2d 355 (5th Cir.1980). Further, in non-jury actions, the trial court's determination of damages is reviewable only for abuse of discretion, subject to being set aside as a finding of fact under the 'clearly erroneous' standard of Rule 52(a) of the Federal Rules of Civil Procedure. *Smith v. Manausa*, 535 F.2d 353 (6th Cir.1976). As to excessive awards, each case must be determined on its own facts and comparing damage verdicts rendered in different cases is not a satisfactory method for determining excessiveness in a particular case. *Allen*, 623 F.2d at 364 (Quoting *Wiley v. Stensaker Schiffahrtsges*, 557 F.2d 1168, 1172 (5th Cir.1977).

However, if an abuse of discretion is found, then this Court may resort to prior awards in comparable cases for guidance in fixing the appropriate award. The award may be lowered (or raised) to the highest (or lowest) point which is reasonably within the trial court's discretion. *Tracy v. Jefferson Parish*, 523 So.2d 266 (La.App. 5 Cir.), *writ denied*, 530 So.2d 569 (La.1988); *Spangler v. North Star Drilling Co.*, 552 So.2d 673 (La.App. 2 Cir.1989).

Youn's injury consisted of a severe lacerations [sic] of the femoral artery and femoral vein in his left leg and severed main artery and vein in the lower part of the leg, requiring that both the artery and vein be replaced and reconstructed. Youn initially spent five weeks and underwent five surgeries at Our Lady of the Lake Hospital in East Baton Rouge. Eventually, two-thirds of his quadriaps muscle was removed. During his hospital stay, Youn was

in great and sustain pain requiring heavy sedation. He was also fearful that his leg would have to be amputated.

After his return to Korea, Youn ruptured the hamstring muscle which required surgical repair. The condition of Youn's leg as a result of the accident prevented the hamstring muscle from healing normally, thus causing additional damage.

Youn currently has between a 30-35% disability of the left lower extremity, which translates to a 14% total disability rating of the entire body. The leg is void of muscle mass, and consists of only bone, artery and skin. His left leg is considerably thinner than his right and is covered with scars from groin to foot. However, plaintiff is able to walk without crutches or other aid, but he walks with a moderate limp. He currently takes pain medication on an occasional basis. Youn cannot stand for extended periods of time and will never be able to do heavy work. In addition, Youn may have to undergo further surgery in the future. Youn also stated that the appearance of his leg has caused him anxiety, embarrassment and pain and has caused marital difficulties.

Even though Youn's injuries are undoubtedly severe, and permanent in some respects, we find that in certain areas, the trial court abused its discretion (on the high side) in awarding damages of 1.4 million dollars. Accordingly, we turn to comparable cases to determine the highest amount the trial court could have reasonably awarded in this case.

In *Jaffarzad v. Jones Truck Lines, Inc.*, 561 So.2d 144 (La.App. 3 Cir.), *writ denied*, 565 So.2d 450 (La.1990), plaintiff suffered injuries to both legs as a result of an

automobile accident. Plaintiff was initially hospitalized for over three months during which time three surgeries were performed. After his release, he underwent two more surgeries, and his doctor predicted that he would need one more operation. Plaintiff was partially disabled, with a 15% functional impairment to his left leg and a 5% functional impairment to his right leg. He could not do prolonged walking or manual labor. Plaintiff also suffered from back pain due to his unnatural walking gait. The trial court awarded damages of $250,000.00. On appeal, the court increased plaintiff's award of general and special damages to $450,000.00.

In *Peterson v. Western World*, 536 So.2d 639 (La.App. 1 Cir.1988), *writ denied*, 541 So.2d 858 (La.1989), the 39 year old plaintiff fell fifteen to twenty feet off a structure and sustained a severe compression fracture of the right ankle, a fracture of the left heel and a compression fracture of the spine. Plaintiff was hospitalized for one week following surgery where two inch screws were implanted in his right ankle. Plaintiff was then bedridden for three weeks, wheelchair bound for a few weeks and then walked with crutches for two – three weeks. During his first few weeks, plaintiff's pain was so great he could not talk on the phone. Plaintiff underwent a second unsuccessful operation to remove the screws from his ankle. At the time of trial, plaintiff had a 25 to 40% permanent partial disability, was expected to undergo at least one more surgical procedure, was unable to continue working or participate in recreational sporting activities. On appeal, the court affirmed a general damage award of $400,000.00.

In *LeBleu v. Dynamic Indus. Constructors,* 526 So.2d 1184 (La.App. 3 Cir.), *writ denied,* 528 So.2d 154 (La.1988), plaintiff's right ankle was fractured in a construction accident (plaintiff had lost his left leg in a prior hunting accident.). After surgery, complications arose and plaintiff could not use the ankle at the time of trial. Plaintiff was totally disabled, could walk only short distances with extreme effort and could no longer enjoy recreational activities. Plaintiff also developed traumatic neurosis. On appeal the trial court affirmed a general damage award of $300,000.00.

In *Snyder v. Taylor,* 523 So.2d 1348, 1355-56 (La.App. 2 Cir.), *writ denied,* 531 So.2d 267, 268 (La.1988), plaintiff was involved in an automobile accident. His injuries were, in our opinion, similar in severity in many respects to those suffered by the plaintiff here:

> Plaintiff suffered multiple and severe injuries. He was unconscious in the highway for 40-45 minutes before an ambulance arrived. The witness Curtis said that before the ambulance arrived he observed that
>
> > The bone was sticking out of [plaintiff's] left thigh. His knee was turned around almost touching his left buttock area. His right foot was turned completely around, and his ankle bone was sticking through his sock.

Curtis said that plaintiff was screaming as he held him down and covered him with a blanket.

Plaintiff, his wife, and experts testified about the past and present extent of his injuries and disabilities. Depositions of Dr. Bailey and Dr. Moyer, the orthopedic

surgeons who treated plaintiff, were introduced. Dr. Bailey said:

> He had an obvious open fracture of the left femur, or the thighbone, between the knee and the hip, that the bone was broken and out through the skin. * * *
>
> He had a closed or a fracture without protrusion of the bone through the skin of the same leg below the knee, with obvious deformity and swelling in that area, and an obvious fracture that was out of line. [Both bones below the knee were broken.] * * *
>
> He had a dislocation of the right ankle, again open with the entire lower tibia, or shinbone, and the top of the ankle exiting, or stuck out, through the skin, also. * * *
>
> [The right foot] was attached, but was rotated about 130 degrees . . . He had no pulse in his foot.

Dr. Bailey stated that the repair of plaintiff's right ankle and foot and left leg required several surgeries in which plates and pins were inserted and bone grafts were performed.

Although the most serious injuries suffered by plaintiff were those to his lower extremities, plaintiff also suffered a broken and lacerated nose, a lacerated eyelid, a lacerated lip, a severely lacerated left forearm, and broken and disaligned teeth.

Also in *Snyder:*

> Plaintiff underwent nine separate surgical procedures.

Dr. Bailey expected plaintiff to suffer continued pain in his right ankle and weakness in his left leg due to arterial injuries.

Dr. Moyer stated that plaintiff has restricted motion of 20 percent in his right ankle and that the left tibia (lower leg) is bowed or malaligned. Dr. Moyer believed that the likelihood of a degenerative process of the left knee was 'very, very good' due to the malalignment in the left leg. He recommended that plaintiff refrain from any activity that would put pressure on his legs and suggested swimming or bike riding for physical activities.

Plaintiff testified at trial almost six years after the accident. He said he continues to suffer pain and stiffness in his right ankle, numbness in his left leg, lower back pain and stomach problems due to the extensive medication he has taken since the accident.

Plaintiff, a healthy 28-year-old engineer in 1980, was physically active and enjoyed jogging and snow skiing before the accident. He has since been unable to engage in such activities.

Plaintiff suffered what was described as severe pain, especially in the hours and days immediately following the accident. He was hospitalized more than 30 days. He was in the early stages of a career which required physical exertion. Plaintiff is forever prevented from participating in many of the previous physical activities he enjoyed and continues to suffer pain with substantial prospects for further degenerative problems.

Plaintiff's physical injuries are comparable to those suffered by the young plaintiff in *Klein*

> *v. Himbert*, 474 So.2d 513 (La.App. 4 Cir.1985), who was awarded $300,000 in general damages. Unlike the plaintiff *Klein*, supra, plaintiff's disabilities also prevent him from being a physically active civil engineer, a career for which he was educated and trained.

The appellate court found no abuse of discretion in the trial court's award of $325,000.00.

In *Simeon v. T. Smith & Sons, Inc.*, 852 F.2d 1421 (5th Cir.1988), *cert denied, T. Smith & Sons, Inc. v. Simeon*, 490 U.S. 1106, 109 S.Ct. 3156, 104 L.Ed.2d 1019 (1989), plaintiff's foot was nearly severed from his ankle. He was hospitalized for two months and underwent a series of operations. At the time of trial, plaintiff could only walk short distances, had to use a cane and was unable to return to work. He was depressed and was experiencing marital difficulties. After trial, the jury returned a verdict with a general award of damages of $1,250,000.00. The trial court ordered a remittitur of $750,000.00. On appeal, the court further reduced the award, awarding general damages of $600,000.00. In reaching this figure, the court examined eight cases involving comparable injuries, which contained various awards of general damages ranging from $75,000.00 to $500,000.00.

Comparing the facts in the above case and the various awards with the facts and the award in the present case for total damages we find that a total of $600,000.00 is the maximum amount the trial court could have reasonably awarded and accordingly, we find that the awards of damages must be reduced in this case.

We are aware that the comparable awards discussed are all for "general" damages which would include past

and future physical pain, past and future mental anguish and loss of enjoyment of life and disability and disfigurement. However, in the case sub judice, we find it *necessary to break down the award into categories* (as did the trial court) because of the necessity under admiralty law to exclude pre-judgment interest on future, unaccrued non-economic damages; see discussion, infra.

Accordingly, we partition the award of general damages as follows:[2]

TOTAL	$600,000.00
Past Physical Pain and Suffering	85,800.00
Future Physical Pain and Suffering	128,400.00
Past Mental Anguish and Loss of Enjoyment of Life	85,800.00
Future Mental Anguish and Loss of Enjoyment of Life	128,400.00
Disability and Disfigurement	171,600.00
Past	68,640.00
Present and Future Damages	102,960.00

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[2] In the original general damage award, the individual elements were proportionate to the whole in the following percentages: Past physical pain and suffering – 14.3%; future physical pain and suffering – 21.4%; past mental anguish and loss of enjoyment of life – 14.3%; future mental anguish and loss of enjoyment of life – 21.4%; and disability and disfigurement – 28.6%. Furthermore, the past awards compared to the future awards in a ratio of 2 to 3. Accordingly, in reducing the award, we have utilized the same percentages.

PRE-JUDGMENT INTEREST

Atlantia and MOC allege that the trial court erred in awarding pre-judgment interest on the damage award for future losses. When a case is brought under the general maritime law as well as a Jones Act claim, tried before a judge, award of pre-judgment interest lies within the trial court's discretion. *Mihalopoulos v. Westwind Africa Line, Ltd.*, supra; *Williams v. Reading and Bates Drilling Co.*, 750 F.2d 487 (5th Cir.1985).

However, while the trial court generally has discretion to award pre-judgment interest on most damage awards, pre-judgment interest is *not* awardable on future, unaccrued damages. *Boyle v. Pool Offshore Co., a Div. of Enserch Corp.*, 893 F.2d 713 (5th Cir.1990); *Spangler v. North Star Drilling Co.*, supra.

Accordingly, we further amend the judgment to reflect that plaintiff *is* entitled to *pre-judgment* interest on awards for damages *except* those for *future* damages. Plaintiff is entitled to interest from date of judgment on those amounts.

FUTURE MEDICAL EXPENSES

In order to recover for future medical expenses, a plaintiff must prove that it is more probable than not that such expenses will be undertaken and incurred. *Whatley v. Regional Transit Authority*, 563 So.2d 1194 (La.App. 4 Cir.1990), *writ denied*, 569 So.2d 965 (La.1990).

Dr. Davis, one of plaintiff's initial treating physicians, testified that the estimated longevity of a vascular graft was 10 years, therefore, it was more probable than

not that plaintiff would have to undergo surgery within ten years. Plaintiff's life expectancy from date of trial was 33.8 years; therefore, it is more probable than not that plaintiff will be required to undergo more than one surgical procedure. Dr. Davis testified further that the present cost of such surgical procedure is $10,000.00. Dr. Davis also stated that plaintiff should see a vascular surgeon for an examination once a year.

Dr. Martin Bell, another treating physician, testified that he recommended reconstruction surgery for plaintiff's thigh, which would currently cost $23,500 to $42,000.

Plaintiff testified that he presently did not wish to undergo surgery, however, Dr. Davis testified in effect, that his physical condition would decline to the point in the future where he would be *required* to undergo surgery.

Considering the above testimony we see no abuse in the trial court's discretion awarding $40,000.00 for future medical expenses.

PAST LOST EARNINGS

Defendants allege that the trial court erred in awarding lost wages without taking into consideration that Youn was paid full wages from the date of the accident until October, 1989 and 60% of his wages from November, 1989 until the trial. Defendants argue that awarding plaintiff the full amount of wages to which he was entitled from date of accident to date of trial constitutes double recovery.

Plaintiff's argument in response is two-fold. First, he argues that defendants failed to affirmatively plead offset or credit as a defense and therefore cannot raise this issue on appeal. Second, plaintiff alleges that defendants were obligated to pay these amounts as maintenance and cure.

Affirmative defenses have been held to be:

> . . . any response[s] by the defendant which raises new matter which *'assuming the allegations of the petition to be true,* constitutes a defense to the action which will have the effect of defeating the plaintiff's suit on the merits.' *Langhans v. Hale,* 345 So.2d 1226 (La.App. 1st Cir.1977), *Modicut v. Bremer,* 398 So.2d 570 (La.App. 1st Cir.1980), and *Rourke v. Cloud,* 398 So.2d 57 (La.App. 3rd Cir.1981).

Nolan v. Attwood, 484 So.2d 289, 292 (La.App. 3 Cir.1986).

The Third Circuit has also held that a claim of credit or payment is an affirmative defense which must be specifically pleaded and provided by the defendant. *Galland v. Nat. Union Fire Ins. Co.,* 452 So.2d 397 (La.App. 3 Cir.1984). We are inclined to agree.

A review of the record shows that defendants did not raise offset or credit as a defense in any of their pleadings filed. However, in the case before us, defendants are not precluded from raising payment as a defense for the following reasons. At the trial, plaintiff *stipulated* that he was paid his wages, pursuant to union contract. Donald Farmer, MOC's Assistant Manager of the Crew Department, also testified that plaintiff was paid *after* the date of the accident pursuant to union contract. Objection was made by the defendants to the introduction of the union contract itself; however, there is no objection on the

record to the evidence that plaintiff received payment from the date of injury to the date of trial.

C.C.P. art. 1154 provides:

> When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised by the pleading. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure to so amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby, and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense on the merits. The court may grant a continuance to enable the objecting party to meet such evidence.

Accordingly, our view is that the pleadings in this case were enlarged to include the affirmative defense of setoff or credit by the introduction of evidence of payments to plaintiff without objection. In accord, see *Sider v. Robin Temporary Service*, 515 So.2d 1123 (La.App. 5 Cir.1987), *writ denied*, 519 So.2d 146 (La.1988) and *Lacroix, Waring and Derbonne v. Anderson*, 461 So.2d 1187 (La.App. 3 Cir. 1984), *writ denied*, 465 So.2d 735, 737 (La.1985).

However, our view above is actually of no help to defendants because plaintiff argues that the payments he

received were in the nature of "maintenance" and not lost wages – and we agree – for the following reasons.

In *Ceja v. Mike Hooks, Inc.*, supra, the court held that maintenance payments could *not* be deducted from an award for past lost wages and it also defined "maintenance," as follows:

> Appellant argues that the trial court erred in using the motive of preventing double recovery to offset the award of past lost wages with the amount of maintenance paid. On the basis of our recent decision, in *Morel v. Sabine Towing & Transportation Co.*, 669 F.2d 345 (5th Cir.1982), we agree.
>
> In *Morel*, appellant shipowner had appealed the district court's award of maintenance to an injured seaman during a period of compensated vacation. The *Morel* panel, viewing compensated vacation as a method of deferred wage payment and hence as 'earned wages,' held that the district court's award of both damage elements was proper as wages were 'separate and distinct from maintenance.' *Id.* at 347. The Court elaborated:
>
> > 'Maintenance' is the equivalent of the food and lodging to which a seaman is entitled while at sea. Maintenance, and its necessary companion cure, are hallowed rights of seaman who are injured or become ill while in the service of a ship. . . . Maintenance is neither a substitute for wages nor is it to be considered in lieu of a seaman's wages, in whole or in part.

Id. at 346. We have concluded therefore, that absent an 'explicit contractual provision specifying that . . . wages [are] to be deemed a substitute for maintenance, there is no basis for crediting such earned wages against the vessel owner's maintenance obligation.' *Id.* (quoting *Shaw v. Ohio River Co.*, 526 F.2d 193 (3d Cir.1975). [Footnotes omitted].

In the case sub judice, the union contract specifying plaintiff's terms of employment and rate of pay provided:

SICK PAY

SECTION 17

(i) When a Seafarer is discharged and hospitalized at any port outside of Korea, because of sickness or injury, the amount equivalent to his Basic Wage daily prorate shall be paid as the Sick Pay for the hospitalization period outside of Korea.

(ii) In case the sickness or injury is due to an accident arising out of and/or in the course of the Seafarer's employment, he shall be entitled to sick pay at a rate equivalent to his Basic Wage daily prorata during the medical attention for a maximum period of four (4) months from the date of his return to Korea, and when the sickness or injury has not been cured after the lapse of this four months, the Sick Pay shall be sixty (60) percent of his Basic Wage therefrom until he is medically declared to have reached a maximum cure or to be incurable.

It is apparent that this provision sets forth a *method to calculate* the amount of "maintenance and cure" a seaman

is entitled to; it does *not* state that wages are to be paid *in lieu* of maintenance. Therefore, because there is no express contractual provision specifying that wages are to be deemed a substitute for maintenance we find that the trial court did not err in awarding lost wages without a credit for sums paid to plaintiff from date of accident to date of trial as these latter sums constitute "maintenance and cure" and *not* wages. See *Ceja, supra.*

LOSS OF "FOUND"

Defendants assigns [sic] as error, the award for the "loss of found"[3] suffered by the plaintiff in the amount of $41,222.00. We agree.

In his reasons for judgment, the trial judge gave this rationale for this item of damages:

> "The court finds that the plaintiff carried his burden of proof on the issue of 'found' through testimony that the plaintiff was provided with clothing and meals everyday which would equate to at least $10.00 per day in value. The Court takes 'judicial notice' of the costs of such matters."

LSA-C.E. 201 provides:

> A. Scope of Article. This Article governs only judicial notice of adjudicative facts. In

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[3] "Found" is a term peculiar to admiralty cases. It is usually defined as the sum which represents the living expenses furnished to the seaman by his employer as a condition of employment. Maraist, *Admiralty in a Nutshell.* It includes such elements as a seaman's daily meals and his clothing.

'adjudicative fact' is a fact normally determined by the trier of fact.

B. Kinds of facts. A judicially noticed fact must be one not subject to reasonable dispute in that it is either:

(1) Generally known within the territorial jurisdiction of the trial court; or

(2) Capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

C. When discretionary. A court may take judicial notice, whether requested or not.

D. When mandatory. A court shall take judicial notice upon request if supplied with the information necessary for the court to determine that there is no reasonable dispute as to the fact.

E. Opportunity to be heard. A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior opportunity to be heard, the request may be made after judicial notice has been taken.

F. Time of taking notice. A party may request judicial notice at any stage of the proceeding but shall not do so in the hearing of a jury. Before taking judicial notice of a matter in its instructions to the jury, the court shall inform the parties before closing arguments begin.

G. Instructing jury. In a civil case, the court shall instruct the jury to accept as conclusive any fact judicially noticed. In a criminal case, the court shall instruct the jury that it may,

but is not required to, accept as conclusive any fact judicially noticed.

In *Elliott v. U.S. Fidelity & Guar. Co.*, 568 So.2d 155 (La.App. 2 Cir.1990), the court observed:

> Disputed facts are not in the same vein as the laws of nature, geographic and historical facts, time, laws and other matters of common knowledge. The resolution of disputed issues of material fact by judicial notice is improper. *Pierce v. Board of Supervisors of Louisiana State University*, 392 So.2d 460 (La.App. 1 Cir.1979).

The value of lost meals and clothing are those types of facts which *are* disputed. Consequently, we find that the trial court was not entitled to take "judicial notice" of the loss of found or the amount thereof. The record reflect that plaintiff did not offer any evidence as to the value, per day, of meals and clothing or as to how many days the plaintiff would have been entitled to receive meals and clothing. Accordingly, we hold that the trial court did, indeed, err in awarding plaintiff $41,222.00 for "loss of found." This award of the trial court is obviously manifestly erroneous and will be annulled and set aside.

APPLICABILITY OF THE DIRECT ACTION STATUTE

In pre-trial, GARD filed exceptions of no cause and/or right of action, alleging among other things that it could not be sued under the Direct Action Statute, LSA-R.S. 22:655, because that statute did not apply to "ocean marine and foreign trade insurances" quoting LSA-R.S. 22:611 which provides that "the applicable provision of this [Insurance Code] shall apply to insurance other than ocean marine and foreign trade insurances." GARD now

alleges on appeal that the trial court erred in denying GARD's exception of no cause and/or right of action. We do *not* agree.

R.S. 22:655 allows a plaintiff to proceed directly against an insurance company who has issued a policy or contract of liability insurance. In *Quinlan v. Liberty Bank and Trust*, 575 So.2d 336, 347 (La.1991) the court held that the statute "applies to *any* insurance against the liability of the insured for the personal injury or corporeal property damage to a tort victim, regardless of whether the policy is formed in liability or indemnity terms[.]" [Emphasis supplied]. It has been held that protection and indemnity insurance, and more particularly, ocean marine indemnity insurance is subject to the Direct Action Statute. *Olympic Towing Corp. v. Nebel Towing Co.*, 419 F.2d 230 (5th Cir.1969), *cert. denied, Nebel Towing Co. v. Olympic Towing Co.*, 397 U.S. 989, 90 S.Ct. 1120, 25 L.Ed.2d 396 (1970); *Cushing v. Maryland Cas. Co.*, 198 F.2d 536 (5th Cir.1952) *rev'd on other grounds* 347 U.S. 409, 74 S.Ct. 608, 98 L.Ed. 806 (1954).

In *Coleman v. Jahncke Service, Inc.*, 341 F.2d 956, 960-61 (5th Cir.1965), *cert. denied, Jahncke Service, Inc. v. Greater New Orleans Expressway Commission*, 382 U.S. 974, 86 S.Ct. 538, 15 L.Ed.2d 465 (1966), the court said:

> LSA-Rev. Stat. 22:611 provides that the Louisiana Insurance Code 'shall apply to insurances other than ocean marine and foreign trade insurances.' The district court, however, held that the policy issued to Jahncke, although a policy of hull insurance, was also a public liability policy, subject to the Code, and therefore to the Direct Action Statute. The policy insured

> Jahncke against liability for personal injury or property damage caused by the Claribel. The direct action statute, by its terms, applies to every 'policy or contract of liability insurance.' Though historically no love has been lost between the direct action statute and the Fifth Circuit, we resist the temptation to manacle an old and now beaten enemy. "There is no indication in sec. 655 that the Louisiana legislature intended to deny the right of direct action to persons covered by maritime policies, while extending it to all others.

Accordingly, we agree with appellee's contention that, the general language at the beginning of section XIV (LSA-R.S. 22:611, supra) of the insurance code does *not* supersede the more specific language of the Direct Action Statute which allows a plaintiff to proceed directly against *all* liability policies, including ocean marine indemnity insurance policies.

The defendants cite *Deshotels v. SHRM Catering*, 538 So.2d 988 (La.1989); *Backhus v. Transit Cas. Co.*, 549 So.2d 283 (La.1989) and *Sifers v. General Marine Catering Co.*, 892 F.2d 386 (5th Cir.1990) in support of their contention that the direct action statute does not apply to ocean marine insurance. These cases involved the claims against the Louisiana Insurance Guaranty Association (LIGA). We find these cases distinguishable or inapplicable from the instant case and decline to follow them.[4] We are not bound by these decisions and decline to follow them.

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[4] In *Deshotels*, supra at 992-93, the court stated that:

> The Louisiana Insurance Code does not define 'ocean marine' insurance. That insurance is not only

Accordingly, we conclude that the trial court correctly denied GARD's exception of no cause and/or right of action concerning the Direct Action Statute.

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excluded from LIGA coverage but also from the scope of Part XIV, which applies to 'The Insurance Contract' and includes the Louisiana direct action statute. In context, the term 'ocean marine' is used as a synonym for traditional marine insurance, that is, property insurance on hulls, freights and cargoes. *Blair [v. Sealift, Inc.]*, supra. It contrasts with the definition of marine protection insurance in LSA-R.S. 22:6(13)(e), which is insurance against liability for death or personal injury resulting from use of a vessel 'in *ocean* or inland waterways.'

Sifers, Coe [v. L & L Sandblasting, Inc., 707 F.Supp. 874 (W.D.La.1988)], *George [v. Bailey Coke and Transport, Inc.*, 672 F.Supp. 926 (E.D.La.1987)], *Day* and *Backhus* erred in equating all insurance covering maritime claims with 'ocean marine' insurance.

LSA-R.S. 22:1377 states that Guaranty Association insurance applies 'to all kinds of direct insurance, except life, health and accident, title, disability, mortgage guaranty, and ocean marine insurance.' These categories enumerate different kinds of insurance policies, rather than different risks. It follows that the exclusion for ocean marine insurance does not apply to employers' liability policies which incidentally cover risks associated with maritime activities.

In view of the liberal construction given LIGA's protection to the insureds of insolvent companies, it would be anomalous to allow employees to walk in and out of LIGA protection as they board or disembark from a vessel. LIGA has accepted premiums for this covered claim and cannot now deny coverage. An insurance policy which insures an employer against liability to employees is not a policy of

PROOF OF INSURANCE COVERAGE.

GARD alleges that the trial court erred in finding them liable in solido because the plaintiff failed to prove

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'ocean marine' insurance merely because it embraces some maritime risks.

In *Deshotels*, a protection and indemnity policy such as the one in this case was not considered an ocean marine policy.

In *Backhus v. Transit Cas. Co.*, supra, the court found that under the definitional statutes in the LIGA code, marine protection and indemnity policies fell within the scope of ocean marine insurance. Two members of the *Backhus* court dissented.

In *Sifers*, supra, the Fifth Circuit followed *Backhus*, and found that plaintiffs who have suffered personal injuries and defendants who have been forced to pay for those injuries have no recourse against *LIGA* pursuant to defendant's protection and indemnity policy, as those policies, under LIGA statutes, were policies of marine insurance.

More recently, in *Delaune v. Saint Marine Transp. Co.*, 749 F.Supp. 1463 (E.D.La.1990), the court held that the Louisiana Supreme Court in *Deshotels* and *Backhus* implicitly overruled the holding in *Cushing*, supra and its progeny, (including *Coleman*, supra) that under Louisiana state law a direct action may be asserted against a marine protection and indemnity policy. See also *Perreira v. Saint Marine Transp. Co.*, 1991 A.M.C. 1213, 1990 WL 299890 (E.D.La.1990).

Furthermore we note that the federal courts of Eastern District of Louisiana are not uniform in this conclusion.

In *Tassin v. Hess Marine*, 1990 W.L. 93831 (E.D.La., June 28, 1990) and in *Butler v. Western Company*, 1990 W.L. 93855 (E.D.La., June 28, 1990), the plaintiff was allowed to proceed directly against the insurer of the ship owner/employer. The court refused to apply *Backhus* and *Sifers*, citing *Cushing* and *Coleman* and held:

> There is no indication that the legislature intended that the term 'ocean marine insurance' as used in Section 22:611 should be applied to Section

any insurance coverage by GARD for Atlantia and/or MOC, and/or the terms and conditions of such coverage.

The burden of proof is on the plaintiff to establish every fact in issue which is essential to his cause of action or right of recovery, including the existence of the policy sued on, its terms and provisions, and that his claim is within its coverage. *Vallery v. All American Life Ins. Co.*, 429 So.2d 513 (La.App. 3 Cir.1983); *writ denied*, 434 So.2d 1091, 1100 (La.1983); *Gulf Wide Towing v. F.E. Wright (U.K.)*., 554 So.2d 1347 (La.App. 1 Cir.1989); *Barber v. Best*, 394 So.2d 779 (La.App. 4 Cir.1981).

A review of the record reflects that plaintiff failed to meet its burden of proof against GARD. GARD refused, in the beginning of the trial to stipulate to its policy (as is usually done) and plaintiff failed to introduce the policy into evidence or otherwise prove any terms and conditions of any such policy.

The only evidence in the record to prove the existence and extent of insurance coverage is GARD's answer to plaintiff's amended petition and Atlantia's answer to interrogatory No. 8. In its answer, GARD admitted that it provided to the M/T Atlantia, and her owner, a contract of protection and indemnity, insuring against "certain

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655 to deprive injured persons of the right to bring a direct action against an insurance company merely because the policy in question is a "protection and indemnity' policy while we certainly are not bound by these cases emanating from the federal district courts, they add strength to our position here.
Tassin v. Hess Marine, supra.

specifically enumerated protection and indemnity risks." Atlantia, in answering interrogatory No. 8, said "Atlantia Tanker Corporation is insured by Assuranceforeningen GARD." No other evidence of the existence or extent of insurance coverage was introduced or admitted.

Since GARD admitted that some type of insurance coverage existed, the plaintiff was entitled to use this confession to prove its case. However, there is nothing in the record which proves the terms and provisions of the policy and/or that the coverage provided by the policy encompasses plaintiff's claim against Atlantia. Whereas we conclude that GARD is technically correct in requiring the plaintiff to introduce the policy and prove that it covers the negligence and damages proven, we also do not feel that equity or the ends of justice would be served by allowing GARD to escape their just liability through such technical legal maneuvering since both GARD *and* Atlantia and MOC *admitted* the existence of a policy. Accordingly, since we have ample precedence from other courts for this action, we remand the case to allow plaintiff to obtain and introduce into evidence the policy and/or evidence of its terms and provisions and the scope of its coverage, all of which can be decided by the trial judge. *Mitchell v. Wall,* 482 So.2d 817 (La.App. 4 Cir.1986); *Balehi Marine v. Fireman's Ins. Co. of Newark,* 460 So.2d 16 (La.App. 1 Cir.1984); *writ denied,* 462 So.2d 654 (La.1985); *Lucas v. Doe,* 371 So.2d 336 (La.App. 4 Cir.1979); *Carriere v. Triangle Auto SVC,* 340 So.2d 665 (La.App. 4 Cir.1977).

DENIAL OF CONTINUANCE.

On September 28, 1990, the first day of trial, GARD sought a continuance, alleging that it had no knowledge of the alleged defective condition of the control lever of the winch until September 11, 1990, when plaintiff's deposition was taken. The motion for continuance was denied and GARD applied to this Court for supervisory writs. This Court refused to issue writs and denied relief, finding no abuse of the trial court's discretion. On appeal, GARD again alleges as error the trial court's denial of its motion for continuance.

"A continuance may be granted in any case if there is good ground therefor." LSA-C.C.P. art. 1601. Such a determination is within the sound discretion of the trial court. *Ten Point Properties, LTD v. Roussel*, 506 So.2d 179 (La.App. 5 Cir. 1987).

The trial court, in denying the motion, stated that the pleadings of plaintiff raised the issue of the defective condition of the control lever, and therefore all parties had notice of this issue from the inception of the lawsuit.

Although we feel our previous denial of supervisory writs is the "law of the case" (as per our previous discussion herein), nevertheless, in an abundance of caution and fairness, we have reviewed this issue again, see no reason to change our previous position and, once more, we find no abuse of discretion in the trial court's ruling denying GARD's motion for continuance.

DISPOSITION:

In accordance with our previous discussion herein, the judgment in favor of plaintiff, and against Atlantia and MOC finding them liable, in solido, for damages incurred by plaintiff is amended to read as follows:

1.	Medical expenses, future	$ 40,000.00
2.	Past loss of net earnings	22,642.00
3.	Future loss of net earnings	$200,000.00
4.	Past loss of "found"	-0-
5.	Future loss of "found"	-0-
6.	Past physical pain and suffering	85,800.00
7.	Future physical pain and suffering	128,400.00
8.	Past mental anguish and loss of enjoyment of life	85,800.00
9.	Future mental anguish and loss of enjoyment of life	128,400.00
10.	Past Disability and disfigurement	68,640.00
	Present and Future Disability and disfigurement	102,960.00
	TOTAL	$862,642.00

The judgment is further amended to allow interest from date of judicial demand for the awards for past loss of net earnings, past physical pain and suffering, past mental anguish and loss of enjoyment of life and past disability and disfigurement. Interest is awarded from date of judgment for the awards for future medical expenses, future loss of net earnings, future physical pain and suffering, future mental anguish and loss of enjoyment of life and present and future disability and disfigurement.

The judgment in favor of plaintiff and against GARD, finding them liable, in solido, with the other defendants is set aside and the case is remanded for final outcome further proceedings in accordance with and not inconsistent with this opinion.

Each party is to bear his own costs.

AMENDED, AND AS AMENDED, AFFIRMED IN PART; SET ASIDE AND REMANDED IN PART.

APPENDIX F

The Supreme Court of the State of Louisiana

HAE WOO YOUN

VS. NO. 92-C-3018

MARITIME OVERSEAS CORP.,
ATLANTIA TANKER CORP., AND
ASSURANCEFORENGEN GARD

IN RE: Martime Overseas Corp.; Atlantia Tanker Corp.; – Defendant(s); Applying for Writ of Certiorari and/or Review; to the Court of Appeal, Fifth Circuit, Number 91-CA-0407; Parish of St. James 23rd Judicial District Court Div. "C" Number 19,400

December 21, 1992

Denied.

PFC
JCW
HTL
PH

DENNIS, J., would grant the writ.

Supreme Court of Louisiana
December 21, 1992

/s/ Frans J. Labranche, Jr.
Clerk of the Court
For the Court

The Supreme Court of the State of Louisiana

HAE WOO YOUN

VS.

NO. 92-C-3017

MARITIME OVERSEAS CORP.,
ATLANTIA TANKER CORP., AND
ASSURANCEFORENGEN GARD

IN RE: Youn, Hae Woo; – Plaintiff(s); Applying for Writ of Certiorari and/or Review; to the Court of Appeal, Fifth Circuit, Number 91-CA-0407; Parish of St. James 23rd Judicial District Court Div. "C" Number 19,400

December 21, 1992

GRANTED.

(See order attached)

Supreme Court of Louisiana

December 21, 1992

/s/ Frans J. Labranche, Jr.
Clerk of Court
For the Court

The Supreme Court of the State of Louisiana

HAE WOO YOUN

VS.

NO. 92-C-3017

MARITIME OVERSEAS CORP., ET AL

In re: Hae Wood Youn applying for Writ of Certiorari/ Review No. 19,400 on the docket of the 23rd Judicial District Court for the Parish of St. James, and No. 91-CA-0407 on the docket of the Court of Appeal, Fifth Circuit, State of Louisiana.

And, whereas, the Court has this date, pursuant to Article 5, Section 5, of the Constitution of Louisiana, made and issued the following order, to-wit – "It is ordered that the writ of review issue; that the District Court and the Court of Appeal send up the record in duplicate of the case; and that counsel for all parties be notified."

Now, therefore, the said District Court and the Court of Appeal is hereby commanded, in the name of the State of Louisiana and of this Honorable Court, to send up forthwith to this Court, at the City of New Orleans, the record in duplicate of the above entitled case.

Witness the Honorable Justices of the Supreme Court of the State of Louisiana on this 21st day of December, in the year of Our Lord, One Thousand, Nine Hundred and Ninety-Two.

/s/ Frans J. Labranche, Jr.
Frans J. Labranche, Jr.
Clerk of Court

APPENDIX G

In The

Supreme Court of the United States

October Term 1992

MARITIME OVERSEAS CORP.
AND ATLANTIA TANKER CORP.

Petitioners,

v.

HAE WOO YOUN

Respondent.

No. 92-1532

The petition for writ of *certiorari* is denied.

May 17, 1993

APPENDIX H

In The

Supreme Court of the United States

October Term 1992

MARITIME OVERSEAS CORP.
AND ATLANTA TANKER CORP.
Petitioners,

v.

HAE WOO YOUN
Respondent.

No. 92-1532

The petition for rehearing of order denying writ of *certiorari* is denied.

June 21, 1993

APPENDIX I

Application for

No. '90 -C- -90

COURT OF APPEAL, FIFTH CIRCUIT

STATE OF LOUISIANA

FEB - 5 1990

/s/ Illegible
Dty, Clerk

HAE WOO YOUN

VERSUS

MARITIME OVERSEAS CORPORATION AND ATLANTIA TANKER CORPORATION

In Re MARITIME OVERSEAS CORPORATION AND ATLANTIA TANKER CORPORATION

Applying for SUPERVISORY AND REMEDIAL WRITS OF CERTIORARI, REVIEW, MANDAMUS AND/OR PROHIBITION AND FOR A STAY ORDER DIRECTED TO THE HONORABLE JOHN L. GOLDSMITH, JUDGE 23RD J.D.C., PARISH OF ST. JAMES, STATE OF LOUISIANA, DIVISION "C", NO: 19,400

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WRIT DENIED:

I see no reason to exercise our supervisory jurisdiction in this matter.

/s/ T.C.W., Jr.
JUDGE THOMAS C. WICKER, JR.

JJ. KLIEBERT AND GRISBAUM CONCURRING IN THE DENIAL OF THE WRIT

A Jones Act claim may be brought as either a law claim or an admiralty claim. Plaintiff's amended petition specifically designates his claim as an admiralty claim, thereby eliminating any right to a jury trial. See La. C.C.P. art. 1732(6), FRCP 9(h), and FRCP 38(e).

/s/ T.J.K.
JUDGE THOMAS J. KLIEBERT
/s/ C.G.
JUDGE CHARLES GRISBAUM, JR.

Gretna, Louisiana this 6th day of March, 1990.

APPENDIX J

HAE WOO YOUN

v.

MARITIME OVERSEAS CORPORATION and Atlantia Tanker Corporation.

No. 90-CC-0528.

Supreme Court of Louisiana.

April 16, 1990.

In re Maritime Overseas Corp.; Atlantia Tanker Corp.; – Defendant(s); applying for writ of certiorari and/or review; Parish of St. James, 23rd Judicial District Court, Div. "C", No. 19400; to the Court of Appeal, Fifth Circuit, No. 90-CW-0090.

Denied.

APPENDIX K

TESTIMONY OF
DOCTOR RANDOLPH RICE

[2381]

Q. Okay. Let's talk about found. Assuming found at a value of ten dollars ($10.00) a day, what would that translate to in economic loss for Plaintiff? Assuming again that he would work seventy-six point five percent (76.5%) of the time for his remaining seventeen point four three (17.43%) years.

A. For the past amount, that is from the date of his accident 1989 until today, at ten dollars ($10.00) a day, the annual amount is three thousand six hundred and fifty ($3,650.00). Past amount is three thousand seven hundred and forty-eight dollars ($3,748.00), and that's taking the seventy-six and a half percent (76-½%) as being truly work time. And the present value of[2382] the future, using a below-market discount rate of three percent (3%), ten dollars ($10.00) a day, but taking the seventy-six and half percent (76-½%), thirty-seven thousand four hundred and seventy-four dollars ($37,474.00).

Q. And that's again for the seventeen point four three (17.43) years in the future and taking seventy-six percent (76%) of those . . . seventy-six point five percent (76.5%) of those days of the future, is that right?

A. Yes, Sir.

Q. All right. And that's also the present value . . . in other words, that's discounted by the below-market discount rate or real rate of interest using three percent (3%), is that right?

A. Yes, Sir.

Q. Okay. Now, is it just a matter of mathematics using those same comparisons? In other words, if found were fifteen dollars ($15.00) a day, you would just work it out?

A. You'd raise it by fifty percent (50%).[2383]

Q. All right. And if it were hypothetically five ($5.00) a day, it would be half of this amount.

A. Correct.

Q. And seven dollars and fifty cents a day ($7.50), three-quarters of this amount?

A. Yes, Sir.

Q. Both past and future, right, right?

A. That's true.

Q. Okay. Thank you.

MR. DUE': I'll tender the witness. Would you answer any questions defense counsel has?

* * *

[2399]

Q. Mr. Due' asked you some questions about found. Have you been given any information by anyone as to the value of any found that Mr. Youn may have enjoyed while he working for the Defendant?

A. No, Sir. Other than the hypotheticals that I think Mr. Due' ran through from a range of even five to fifteen dollars ($5.00-$15.00).

Q. But you've heard no . . . Mr. Youn hasn't told you or you have heard no evidence from anyone as to whether or not or what the value of any found he might have enjoyed would have been, is that correct?[2400]

A. That's true.

APPENDIX L

Hae Woo Youn	23rd Judicial District Court
vs. No. 19,400	Parish of St. James
Maritime Overseas Corp. and Atlantia Tanker Corp., et al	State of Louisiana
Filed: December 20, 1990	/s/ Illegible Clerk of Court

REASONS FOR JUDGMENT

This matter came before the Court for trial Friday, September 28, 1990.

Present in Court: The firm of Phelps-Dunbar representing Maritime Overseas Corporation and Atlantia Tanker Corporation; M. D. Yager, representing Assuranceforeningen Gard, Paul Due' and Lewis Unglesby representing the plaintiff, Hae Woo Youn.

The matter had been set for trial, but the Friday before the scheduled trial date, the Assuranceforeningen Gard, MOC, and Atlanta filed a removal petition. This petition was filed without notice to the Court. Remand was granted on September 27, 1990, by the Eastern District, and the trial commenced on Friday, September 28, 1990.

At the commencement of trial, the defendant,

Assuranceforeningen Gard, again requested a continuance and re-urged its claims of lack of jurisdiction. The court denied the relief, writs were taken to the Fifth Circuit which were also denied during the course of the trial that day. Counsel for Assuranceforeningen Gard participated in the trial, filed pleadings, including an answer, questioned witnesses, and adopted the witnesses provided by its insured, Maritime Overseas Corporation and Atlantia Tanker Corporation. Furthermore, counsel for Assuranceforeningen Gard advised the Court on the record, that it provided the insurance coverage to the ship for the incident involved.

The issues to be decided by the Court are the unseaworthiness of the M.V. Atlantia, the negligence of defendants, what contribution those made to the injuries of plaintiff, plaintiff's contributory or comparative negligence, general damages, and the applicability of punitive damages.

The Court is convinced that the defendant MOC, the controlling force over the plaintiff, is plaintiff's employer. This court is further convinced after review of the evidence, pleadings, and the statements in Court, that Assuranceforeningen Gard provides insurance for any damages which may be assessed.

The accident happened because the boat was in an unseaworthy condition, and because of negligence. The winch control lever had been broken for some period of time and did not operate. Accepting the testimony in the light most favorable to the defendants, the Court finds that the winch lever was dysfunctional. Furthermore, the lever

could easily and should easily have been repaired during the six months that it was broken while the boat was in American waters. The crew was non-trained. The Court is impressed by the testimony of all crew members that there were no safety manuals written in Korean, that there was no training provided for any crew members, and that the procedure of MOC was to hire the Korean crew member and put him on the boat. On-the-job training can be expected to lead to accidents. Defendants were negligent. They allowed the crew to use the steam valve because the winch lever did not work. The Court finds that the use of the steam valve is not a safe method, and is not the method intended in the design of the ship for the use of the winch. Mr. Heu released too much steam, accelerating the speed of the winch, leading to the accident. The negligence of a crew member in employing a method approved by his employer is actionable. Choi was ordered to engage the crane reel stopper in the event that the winch control lever began to operate out of control. Choi, because he was afraid, and was being peppered by debris coming off the cable, ran from his post. This placed Bosun Youn in the predicament of having no stopper. At the time that Choi abandons his post, the winch is out of control, Heu had over-accelerated the steam, and the crane boom is beginning to fall. Youn attempts to take action to preserve his employer's property and to save the lives of his fellow workers. The winch cable snaps Youn's leg, creating his injury.

The Court resolves this as a simple matter. The court finds that there is gross negligence in regard to the failure of MOC and Atlantia to provide a seaworthy vessel, and to repair a known broken piece of equipment. The burden of the plaintiff is light. A vessel owner/employer is deemed

negligent if it fails to exercise reasonable care to maintain a reasonably safe work environment. In this case, the evidence overwhelmingly preponderates in favor of plaintiff and against defendant.

The Court finds as a fact, that the crew was not properly trained in the operation of the winch. The Court finds as a fact, that there was no training to the crew as to what action to take in the event the winch became out of control as occurred here, and further, that because the vessel owner failed to repair the broken winch, or to employ an automatic stopper, it was foreseeable that an event such as this would occur. The court finds that at no time did any superior member of the Atlantia crew, or MOC corporation, require Youn or anyone else to use any alternative method in winding the winch.

Defendants argue that the use of the gypsy head to wind the excess cable onto the winch drum, would avoid the accident. The defendants suggest that all slack betweeen the crane reel and winch drum should be taken in. The Court was impressed by the fact that the actions taken by Youn appeared to be commonplace, and further that the captain of the boat had no knowledge as to what methodology was correct. The captain admits that they were in a substantial hurry because the pilot had come to move the boat and that it was Youn's job to get the crane in a position to shove off. Youn testified and his crew members support the idea, that the method he was using was the most efficient, and that they had never been instructed to avoid that method nor of any safety hazards created by the method.

The Court is not impressed by the defendants' efforts to blame the accident on Youn's use of the method employed by him, instead of their failure to train their crew, and to repair their broken equipment which they provided to Youn.

The Court is not impressed by the claim that Youn used a "shortcut" in view of the Captain's testimony that they were in a hurry to take off, and all witnesses' testimony that Youn was an experienced, knowledgeable bosun. The Court finds that had the winch been repaired, or had the untrained crew members stayed at their post, or had the steam valve not been overcharged, the accident would have been avoided. All this is directly placed at the feet of the defendants. Furthermore, from reviewing the evidence, including the photographs, the Court does not believe that it would be practical or probable, that all of the line could be placed on the gypsy head.

Defendants' reliance on certain OSHA regulations, mentioned for the first time by defendants in post-trial briefing, is unwarranted, since OSHA regulations are not applicable to working conditions of seamen on vessels such as the M. V. Atlantia. *Clary v. Ocean Driling and Exploration Comapny,* 609 Fed.2d 1121 (5th Cir. 1980).

The Court does not find Mr. Youn contributorily negligent. He acted in accordance with his training, he was given inadequately trained helpers, one of whom abandoned his post, and he was required to work with defective equipment. The Court is well aware of the pressure placed upon a foreign seaman to do the job required, and the inability of a seaman to refuse his duties. The Court further

notes the substantial conflicts in the testimony of the crew between their discovery depositions taken by the plaintiff and their trial depositions several days later. The Court recognizes in those depositions that the crew members were kept under the total control of the defendants, that certain relevant crew members were present in New Orleans in order to provide information to defense counsel, and at least one was then sent to Tokyo rather than provided for testimony. The record reflects that Port Captain Williams made an inspection of the vessel right after the accident, and condemned the action of the crew and recognized the failure of the equipment. This information was not provided to plaintiff until the eve of trial, and then only inadvertently. The Court, in evaluating the evidence, believes the statements of the crew members taken in the discovery depositions, believes the statements of Captain Williams in his June inspection report, accepts the testimony of Captain Blann as more reasonable based on facts and evaluations consistent with accepted maritime safety practices, and finds evidence in favor of Youn on the issues of unseaworthiness, negligence, and lack of comparative negligence overwhelming.

1.	Medical expenses, future	$ 40,000.00
2,	Past loss of net earnings	$ 22,642.00
3.	Future loss of net earnings	$ 200,000.00
4.	Past loss of found	$ 3,748.00
5.	Future loss of found	$ 37,474.00
6.	Past physicial pain and suffering	$ 200,000.00
7.	Future physicial pain and suffering	$ 300,000.00
8.	Past mental anguish and loss of enjoyment of life	$ 200,000.00

9.	Future mental anguish and loss of enjoyment of life	$ 300,000.00
10.	Disability and disfigurement	$ 400,000.00

These awards are more than deserved. The plaintiff's left leg is nothing more than a stick connecting his thigh bone to his ankle. The scarring demonstration in the pictures represents a river of gruesome tattoos which emcompass and circle the entire leg, from groin to foot. Plaintiff's leg is embroidered with an ungly snake-like appearance. The Court has never seen such a dismaying scene. The Court was most impressed with Plaintiff's sincerity and obvious heartache over his condition. Plaintiff's leg is useless for anything other than support. Dr. Davis described the skin over the bone as a paper thin leg. Plaintiff is in constant jeopardy of any instrusion into the leg, cutting the vessel, and placing his life at risk. There are no muscles, meat, nor fatty tissue in plaintiff's left thigh. Plaintiff's leg swells constantly, will never improve, and is expected to continue on a consistently downward course. Plaintiff will need future medical expenses because the vessels grafted in his leg will wear out over time. This will require at least two more surgeries based on plaintiff's life span. The Court does not see how plaintiff can accomplish any type of future work other than desk duty for which he appears both situationally and educationally unsuited. The plaintiff is totally and permanently disabled, can never return to any kind of physical activity, and must drag around with him, a constant reminder of this event. The impression from plaintiff's testimony, and viewing photographs of his existing condition, persuades the Court that plaintiff is a depressed, sorrowful, embarrassed, gentleman who had previously led an active, healthy, and vital existence. Plain-

tiff is described as a model patient who was most grateful to his American doctors for saving his life. Modern medicine can only do so much, however, and plaintiff's discussion of his wife's reaction when observing his leg upon his return home and to this date, persuades the Court that the disfigurement award is required. Plaintiff leads a life of embarrassment, pain and shame as a result of the injury. He will have lifetime problems. The independent medical exam ordered by the defendants reflects 90 to 100% strength loss in the left leg, and is described by their doctor, as a "near traumatic amputation of the left lower extremity." Plaintiff has a significant whole body impairment rating.

For over an hour plaintiff lay on the deck of the ship where he had worked with pride and dignity, fearful that he would never again stand on his own two feet. The obvious pain described by Capt. Choi was immense both while waiting for the helicopter, and at the hospital. Plaintiff was placed under the most powerful sedatives for most of his hospital stay. As recovery occurred, pain increased with the regeneration of the nerves. Today plaintiff has limited motion, no vitality, and no capacity to exercise or use the leg because of its delicate nature. He lives in constant apprehension of further injury. He has legitimate concerns over blood clots, loss of circulation and graft failures. He lives in Korea, and wet and cold weather create additional problems in his thigh area which the doctors describe as expectable and severe.

The lost wages and future medical are specific. The Court finds that the plaintiff carried his burden of proof on the isue of "found" through testimony that the plaintiff

was provided with clothing and meals everyday which would equate to at least $10.00 per day in value. The Court takes judicial notice of the costs of such matters.

This matter has presented this Court with no doubt whatsoever as tc a proper verdict up to the remaining question of punitive damages. In this proceeding punitive damages are clearly available. The computation of punitive damages comes through no precise measure, and no particular multiplier is required. *Stokes v. Delcambre,* 710 Fed. 2d 1120 (5th Cir. 1983). The Fifth Circuit has noted that treble damages schemes are acceptable as a method of applying punitive damages, and further that other higher and lower multipliers are acceptable. In *Matter of P & E Boat Rentals, Inc.,* 872 Fed. 2d 642 (5th Cir. 1989), the Fifth Circuit adopted the rule of *U.S. Steele Corporation v. Fuhrman,* 407 Fed. 2d 1143 (6th Cir. 1969). The rule provides that the isolated action of a lower level employee, or even a captain, does not support a finding that the corporation or owners are responsible. Stated precisely, the *P & E* rule which this Court feels applicable in this circuit is:

> "We think the better rule is that punitive damages are not recoverable against the owner of a vessel for the act of the master unless it can be shown that the owner authorized or ratified the acts of master either before or after the accident. Punitive damages also may be recoverable if the acts committed were those of an unfit master and the owner was reckless in employeing him." 872 Fed. 2d 652.

The Court also feels that *Self v. Great Lakes Dredge and Dock Company,* 832 Fed. 2d 1540 (11th Cir. 1987),

must be considered herein. The Eleventh Circuit was broken up from the Fifth Circuit, and "Eleventh Circuit Law", like the "Fifth Circuit Law", is of special consideration for this Court. Stated precisely the *Self* rule is:

> "Punitive damages should be available in cases where the ship owner wilfuly violated the duty to maintain a safe and seaworthy ship, as was found to exist on the part of the Great Lakes by the district court, or where the ship owner's acts or failure to act recklessly increase the danger of a disaster."

It is this Court's considered opinion and a specific finding herein that based upon its factual determinations under the *Self* standard punitive damages are due. It is this Court's further considered opinion and a specific finding herein that based upon its factual determinations under the *P & E* standard punitive are not due. The Court cannot contemplate a more compelling example of a need for establishment of a true standard which can be applied uniformly.

While the Court will state for the record that it feels the *Self* standard the more preferable under the Court's understanding of proper judicial application of jurisprudence the Court will reluctantly consider itself bound by the *P & E* standard set forth by the Fifth Circuit and deny punitive damages herein.

The Court taxes all costs against the defendants, including the following expenses:

$ 6,294.22 - Vessel Inspection by Captain Blann

$ 4,462.50 - Expert witness fee, Captain Blann

$ 1,622.50 - Dr. G. Randolph Rice

$ 295.11 - Smart Corporation

$ 344.00 - Deposition costs

The Court further awards plaintiff the following medical expenses as costs necessary for the treating physicians to arrive at their final opinions:

$ 311.00 - Bone and Joint Clinic (Dr. Joe Morgan)

$ 50.00 - Plastic Surgery Group (Dr. Martin Bell)

$ 50.00 - CVT Surgical Center (Dr. David Davis)

The Clerk of Court is hereby instructed to file these Reasons for Judgment in the minutes of this Court and to notify Mr. Paul Due', 8201 Jefferson Highway, Baton Rouge, Louisiana 70809, to prepare and forward a judgment for execution in accordance herewith.

Gonzales, Louisiana this 17th day of December, 1990.

/s/ John L. Goldsmith

John L. Goldsmith, Judge
23rd Judicial District Court

APPENDIX M

HAE WOO YOUN

v.

MARITIME OVERSEAS CORP.,
Atlantia Tanker Corp., and
Assuranceforeigen Gard.

No. 91-CA-407

Court of Appeal of Louisiana
Fifth Circuit.

REHEARING WAS THIS DAY REFUSED IN THE CASE.

October 19, 1992.

No. 93-933 (3)

Supreme Court, U.S.
FILED
JAN 11 1994
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

October Term, 1993

MARITIME OVERSEAS CORPORATION AND ATLANTIA TANKER CORPORATION,
Petitioners

versus

HAE WOO YOUN,
Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether separate itemized awards of general damages under either the Jones Act or the general maritime law for disability and disfigurement, in addition to pain and suffering and mer tal anguish and loss of enjoyment of life, constitute double recovery where the total award of general damages is found not to be excessive?

2. Whether a Jones Act seaman can recover prejudgment interest pursuant to the general maritime law?

3. Whether a seaman must, in addition to proving his loss of employer-provided food and clothing, prove the precise value of that food and clothing in order to recover for loss of found?

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No. 93-933

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1993

MARITIME OVERSEAS CORPORATION
AND ATLANTIA TANKER CORPORATION,
Petitioners

versus

HAE WOO YOUN,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

JURISDICTION

Petitioners seek to invoke this Court's jurisdiction to review a final judgment of the Louisiana Supreme Court pursuant to 28 U.S.C. § 1257(a), which provides:

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where

> the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held by or authority exercised under, the United States.

The petition was filed timely, and respondent concedes the Court's jurisdiction as to the third question presented. Respondent, however, disputes the jurisdiction of this Honorable Court as to the first two questions presented. As is explained more fully below, petitioner's claims as to these issues were not "specially set up or claimed" in the lower courts, and to the extent these questions were resolved, they were resolved on independent and adequate state grounds. Accordingly, the Court lacks jurisdiction as to these questions under *Hill v. California*, 401 U.S. 797, 805-06, 91 S.Ct. 1106, 1111-12 (1971), and *State Farm Mut. Auto. Ins. Co. v. Duel*, 324 U.S. 154, 160, 65 S.Ct. 573, 576 (1945) (both characterizing the rule against deciding claims not pressed or passed upon by a state court as jurisdictional).

STATEMENT OF THE CASE

Respondent, Hae Woo Youn, was the boatswain on the M/T ATLANTIA. On May 23, 1989, on the Mississippi River in St. James Parish, Louisiana, a winch on board the ATLANTIA failed, allowing a boom to fall toward several crewmembers. As he rushed to protect the other crewmembers by attempting to stop the boom, the boom cable wrapped around Youn's leg,

and the full weight of the boom crushed and nearly amputated his thigh. As a result, Youn is totally and permanently disabled.

Youn brought suit against petitioners, Atlantia Tanker Corporation ("Atlantia") and Maritime Overseas Corporation ("MOC"), the shipowners and his employers, alleging negligence under the Jones Act, 46 U.S.C. § 688, and unseaworthiness under the general maritime law. MOC's insurer, Assuranceforeningen GARD, was later added as a defendant pursuant to the Louisiana Direct Action Statute, La. R.S. 22:655. One element of damages sought was loss of "found," that is, the value of the food and clothing received aboard ship by a seaman as a benefit of his employment, which is lost when the seaman can no longer work on board ship. There was no question but that Youn had suffered this loss, so plaintiff's expert economist calculated the value based upon a per diem rate of $10. Following a bench trial, the court found the defendants liable and awarded damages as follows:

Future medical expenses	$40,000.00
Past loss of net earnings	22,642.00
Future loss of net earnings	200,000.00
Past loss of found	3,748.00
Future loss of found	37,474.00
Past physical pain and suffering	200,000.00
Future physical pain and suffering	300,000.00

Past mental anguish and loss of enjoyment of life	200,000.00
Future mental anguish and loss of enjoyment of life	300,000.00
Disability and disfigurement	400,000.00

(Reasons for Judgment, Appendix L, pp. 82a-92a.)

The trial court also awarded interest from the date of judicial demand on the entire amount of damages.

All defendants appealed suspensively. Petitioners, Atlantia and MOC, assigned twelve errors, which are recited verbatim in the opinion of the Louisiana Fifth Circuit Court of Appeal. Atlantia and MOC assigned as errors on the general damages and prejudgment interest issues:

8.

The trial court's award of general damages in the amount of $1,400,000.00 is excessive. The award should be substantially reduced or set aside and a new trial ordered.

9.

The trial court erred in awarding prejudgment interest as to the entire damage award since a substantial portion of the award represents future losses for which interest would not have accrued.

Youn v. Maritime Overseas Corp., 605 So.2d 187, 192 (La. App. 5th Cir. 1992) (Appendix E, pp. 18a-69a, at p. 21a).

The court of appeal affirmed the liability findings of the trial court, but modified a number of the damage awards. Specifically, the court of appeal found that "a total of $600,000.00 is the maximum amount the trial court could have reasonably awarded," 605 So.2d at 204, Appendix at p. 50a; that prejudgment interest was not awardable on future damages, 605 So.2d at 204, Appendix at p. 52a; and that the trial court erred in awarding found, 605 So.2d at 208, Appendix at p. 60a.

After rehearing was denied by the court of appeal, Youn and Atlantia and MOC sought writs of certiorari and/or review from the Louisiana Supreme Court. Again, Atlantia and MOC assigned as error, *inter alia,* the excessiveness of the total general damage award (as reduced by the court of appeal). They did not, however, complain of the award of prejudgment interest. The Louisiana Supreme Court granted Youn's writ application on the issues of the reduction of general damages and the disallowance of found, *Youn v. Maritime Overseas Corp.*, 609 So.2d 239 (La. 1992) (Appendix F, pp. 71a-72a), but the court denied Atlantia and MOC's application, *Youn v. Maritime Overseas Corp.*, 609 So.2d 240 (La. 1992) (Appendix F, p. 70a). Atlantia and MOC then petitioned this Court for certiorari, which was denied. (Appendix G, p. 73a.) Their petition for rehearing was also denied. (Appendix H, p. 74a.)

The Louisiana Supreme Court partially reversed, finding that the trial court had not abused its discretion in awarding general damages. *Youn v. Maritime Overseas Corp.*, 623 So.2d 1257, 1261 (La. 1993) (Appendix A, pp. 1a-13a, at p. 11a).

The supreme court also reinstated the award of found, holding:

> Plaintiff clearly suffered this loss, inasmuch as he will never again receive these sums from his employer while aboard ship. The only issue is the precise value of the loss.
>
> . . . .
>
> Here, the trial judge set the award for loss of found at $10 per day on the basis of evidence that plaintiff's employer had provided meals, lodging and clothing to him daily and the trial court's inference that these daily items would cost at least that amount. Moreover, awards for loss of found in other reported decisions have far exceeded that daily amount. We conclude that the award of $10 per day was supported and should have been upheld.
>
> 623 So.2d at 1261-62 (Appendix A, at pp. 12a-13a).

Atlantia and MOC applied for rehearing. As is noted in their petition for certiorari, Petition p. 5, this rehearing application was the first time they raised the issues of purported double recovery and prejudgment interest. The Louisiana Supreme Court denied the application for rehearing without comment. (Appendix B, p. 14a.)

SUMMARY OF ARGUMENT

The judgment of the Louisiana Supreme Court is correct, but this Court should not reach the merits of that judgment. The petition for certiorari should be denied with respect to the questions of purported double recovery and prejudgment interest because these issues were neither properly presented to nor decided by the Louisiana Supreme Court or any other lower court. Under Louisiana procedural law, a contention raised for

the first time in an application for rehearing before the Louisiana Supreme Court will not be considered. Accordingly, petitioner's arguments on these grounds are procedurally barred. That Louisiana procedural rule constitutes an independent and adequate state ground for the decision that is not subject to review by this Court under 28 U.S.C. § 1257.

Further, since these issues were not properly raised below, certiorari should be denied because this Court does not decide claims "not pressed nor passed upon" in state court. Whether that rule is jurisdictional or prudential, the considerations of comity underlying the rule would be frustrated by reviewing this state court judgment for purported errors never properly urged by these civil defendants.

Finally, as to the remaining question regarding found, the petition should be denied because it presents a factual question concerning sufficiency of the evidence. The evidence in this case has already been reviewed by three courts. State court findings of fact are entitled to deference, and no question of national importance is raised by the conclusion of the Louisiana Supreme Court.

ARGUMENT

I. The Petition Should Be Denied Because Petitioners Failed to Properly Raise the Issues of Purported Double Recovery and Prejudgment Interest Below

In *Michigan v. Tyler,* 436 U.S. 499, 98 S.Ct. 1942 (1978), a state criminal prosecution, the State of Michigan asked this

Court to consider a criminal defendant's standing to object to unconstitutional searches. The Michigan Supreme Court had refused to consider this argument due to the state's failure to raise the issue in either the trial court or the intermediate appellate court. This Court also refused to entertain the argument, holding:

> Failure to present a federal question in conformance with state procedure constitutes an adequate and independent ground of decision barring review in this Court, so long as the State has a legitimate interest in enforcing its procedural rule. . . . . Accordingly, we do not entertain the petitioner's standing claim which the state court refused to consider because of procedural default.
>
> 436 U.S. at 512 n.7, 98 S.Ct. at 1951 n.7.

Similarly, in *Stembridge v. Georgia,* 343 U.S. 541, 72 S.Ct. 834 (1952), the defendant raised a constitutional issue for the first time in a motion for rehearing in the intermediate appellate court, in violation of Georgia's rule that constitutional questions must first be raised in the trial court. The Georgia Supreme Court denied certiorari without an opinion. This Court held, "At this stage, the Supreme Court of Georgia could have denied certiorari on adequate state grounds. Where the highest court of a state delivers no opinion and it appears that the judgment *might* have rested upon a nonfederal ground, this Court will not take jurisdiction to review the judgment." 343 U.S. at 547, 72 S.Ct. at 837. The Court thus dismissed the petition for certiorari as improvidently granted. *Id.* at 548, 72 S.Ct. at 838.

This petition for certiorari should be denied, because petitioners' failure to raise the questions of purportedly duplicative

damage awards and prejudgment interest prior to their application for rehearing constituted a waiver of those claims under Louisiana procedural law. The Louisiana rule was stated in *Rodrigue v. LeGros,* 563 So.2d 248, 257 (La. 1990) (on application for rehearing), "We generally do not grant rehearings to consider issues raised for the first time in the application for rehearing. *Rayner v. Rayner,* 216 La. 1099, 45 So.2d 637 (1950); *State ex rel. Murtagh v. Department of City Civil Serv.,* 215 La. 1007, 42 So.2d 65 (1949)." In *Rodrigue,* the court held that a Louisiana statute did not apply to maritime contracts. The losing party then applied for rehearing, urging for the first time that the contract at issue was not maritime. The court refused to grant rehearing on this new issue.

The same result was probably reached here. Atlantia and MOC raised completely new issues in the application for rehearing. Although the Louisiana Supreme Court did not issue an opinion stating the reasons for the denial of rehearing, it is likely that the court denied the rehearing based upon the rule of *Rodrigue v. LeGros, supra.* That being the case, the basis for the decision was Louisiana procedural law, rather than federal substantive law, and this Court has no jurisdiction over these issues.

Even if petitioners' failure to present their arguments to the Louisiana Supreme Court prior to rehearing were not an adequate and independent state ground for the judgment, the petition for certiorari on these issues would have to be denied on the basis of this Court's traditional rule that "precludes a grant of certiorari . . . when the question presented was not pressed or passed upon below." *United States v. Williams,* ___ U.S. ___, 112 S.Ct. 1735, 1738 (1992) (internal quotations

omitted). The Court has repeatedly refused to consider issues that were not properly presented in the lower courts, particularly state courts. For instance, in *Exxon Corp. v. Eagerton*, 462 U.S. 176, 103 S.Ct. 2296 (1983), the appellant had initially raised a preemption argument in their appellate brief before the Supreme Court of Alabama, but that court did not pass on the issue. Noting the "general practice" of the Alabama appellate courts to refuse to consider issues raised for the first time on appeal, this Court stated:

> The decision below does not discuss this issue, and when " 'the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary.' "
>
> 462 U.S. at 181 n.3, 103 S.Ct. at 2301 n.3, *quoting Fuller v. Oregon*, 417 U.S. 40, 50 n.11, 94 S.Ct. 2116, 2123 n.11 (1974), *quoting Street v. New York*, 394 U.S. 576, 582, 89 S.Ct. 1354, 1360 (1969).

This same language was quoted in *Board of Directors of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 550, 107 S.Ct. 1940, 1948 (1987), where the appellants failed to present the issues to the California appellate court until a petition for rehearing was filed; this Court again refused to address the issue.

The fact that federal law was intrinsically at issue in this maritime law case does not save petitioners from their failure to properly raise these issues. An analogous situation was pre-

sented in *Illinois v. Gates,* 462 U.S. 213, 103 S.Ct. 2317 (1983). The Court there held that where only the applicability of the exclusionary rule had been at issue below, the State of Illinois had not properly raised the issue of a potential modification of the exclusionary rule. In the present case, of course, petitioners have contended that the damage award was excessive as a matter of fact, but they have now abandoned that claim in favor of an argument that the damages are duplicative as a matter of law. The first argument is not sufficient to save the second, because the issues are completely different.

Although some cases have suggested that this is a prudential rule, *see* discussion in *Illinois v. Gates, id.* at 217-24, 103 S.Ct. at 2321-25, respondent submits that, in cases arising from state courts, this rule is jurisdictional. In *Webb v. Webb,* 451 U.S. 493, 101 S.Ct. 1889 (1981), the Court clearly set forth the rule's basis in 28 U.S.C. § 1257, which "requires that in the state courts petitioner have 'specially set up or claimed under the Constitution . . . of . . . the United States' that right which she now seeks to have this Court enforce." 451 U.S. at 495, 101 S.Ct. at 1891. After concluding that the petitioner had not done so, the Court dismissed the writ for want of jurisdiction. *Id.* at 501-02, 101 S.Ct. at 1894.

But regardless of whether the rule is prudential or jurisdictional, the policy that motivates the rule is one of comity between the federal and state judicial systems. As the Court stated in *Webb v. Webb, supra*:

> [A]lthough the States are sovereign entities, they are bound along with their officials, including their judges, by the Constitution and the federal statutory law. Principles of

> comity in our federal system require that the state courts be afforded the opportunity to perform their duty, which includes responding to attacks on state authority based on the federal law, or, if the litigation is wholly private, construing and applying the applicable federal requirements.
>
> 451 U.S. at 499, 101 S.Ct. at 1893.

These principles would hardly be served by ordering review of this case. Three levels of the Louisiana judicial system have performed their duty of reviewing this case. But now petitioners seek to have this Court perform a fourth review, on bases that were never properly presented to the Louisiana courts. This would render the years of work on this case by Louisiana courts essentially meaningless, because they would never have known what the "real issue" was. It would also place this Court in the position of a court of first resort, because the lower courts would have never had the opportunity to resolve the issue correctly, never having had it presented to them. This is manifestly not the situation contemplated by § 1257.

The Louisiana Supreme Court's denial of rehearing was based upon an adequate state ground: the petitioners' procedural default in failing to raise these issues prior to rehearing. Further, this Court's rules require that a federal question be properly pressed and passed on below, and these purported questions were not. The Court should deny the petition as to the first two questions presented, the purported duplication of damages and the propriety of prejudgment interest, because petitioners failed to properly present these issues to the Louisiana courts.

II. The Petition Should Be Denied on the Found Issue Because It Seeks a Review of the Sufficiency of the Evidence

In the third question presented, petitioners are asking this Court to review the sufficiency of the evidence supporting the award for loss of found. The trial court determined that respondent had proved his claim for loss of found. The court of appeal disagreed, but the Louisiana Supreme Court reversed and reinstated the trial court's judgment. There is no reason to perform a third appellate examination of this record through the use of this Court's certiorari power.

Because this Court is primarily concerned with momentous legal issues, the Court "customarily accept[s] the factual findings of state courts in the absence of 'exceptional circumstances.' " *California Retail Liquor Dealers Ass'n v. Midcal Aluminum,* 445 U.S. 97, 111-12, 100 S.Ct. 937, 946 (1980). "Even where a question of fact may have constitutional significance, [the Court] normally accord[s] findings of state courts deference in reviewing constitutional claims here." *Time, Inc. v. Firestone,* 424 U.S. 448, 463, 96 S.Ct. 958, 969 (1976). Yet petitioners seek to have the Court spend its time scouring the record in this case. While factual review is sometimes a necessary incident to cases properly before the Court, the Court "do[es] not grant a certiorari to review evidence and discuss specific facts."*United States v. Johnston,* 268 U.S. 220, 227, 45 S.Ct. 496, 497 (1925). The petition should be denied.

CONCLUSION

This case has been tried, appealed, and appealed again. Petitioners now ask this Court to grant certiorari to consider, for the first time, two legal issues never presented to the lower courts and to reconsider the facts as found by Louisiana's highest court. Petitioners' requests are contrary to the established considerations governing the granting of certiorari. The petition should be denied at petitioners' costs.

Respectfully submitted:

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